INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Preliminary statement	1
Basis for jurisdiction	2
The jurisdictional statutes	2
The decisions demonstrating jurisdiction	2
The statute of the State of Delaware which is claimed to be repugnant to the Constitution of the United States	4
The date of judgments and application for appeal	5
Statement as to the nature of the cases, stage of proceedings and manner in which the constitutional question was raised in the courts below	5
The questions presented are substantial	8
The interstate commerce question	9
The due process of law question	15
The public importance of both questions	19
Conclusion	22
Exhibit "A"—Opinion of the Superior Court of New Castle County, Delaware	23
Exhibit "B"—Opinion of the Supreme Court of Delaware	47

Table of Cases Cited

Adams Mfg. Co. v. *Storen*, 304 U. S. 307	12
Alabama Ry. v. *Jackson Ry.*, 271 U. S. 244	3
Atchison Ry. Co. v. *Wells*, 265 U. S. 101	12, 13
Bandini Co. v. *Superior Court*, 284 U. S. 8	3
Best & Co. v. *Maxwell*, 311 U. S. 454	12
Blaustein v. *Standard Oil Co.*, 49 A. (2d) 726, 51 A. (2d) 568	6
Buck Stove Co. v. *Vickers*, 226 U. S. 205	12
Champlin Rfg. Co. v. *U. S.*, 329 U. S. 29	14
Charleston Assn. v. *Alderson*, 324 U. S. 182	3

Page

Consolidated Textile Co. v. *Gregory*, 289 U. S. 85 .... 3, 15
Cudahy Co. v. *Parramore*, 263 U. S. 418 3
Dahnke-Walker v. *Bondurant*, 257 U. S. 282 ..... 3, 12
Davis v. *Farmers Co-operative Co.*, 262 U. S. 312, 12, 13, 14
Denver & R. G. W. R. Co. v. *Terte*, 284 U. S. 284, 12, 13, 18, 20
Fiske v. *Kansas*, 274 U. S. 380 3
Furst v. *Brewster*, 282 U. S. 493 ..... 3, 12
Gulf Oil Corp. v. *Gilbert*, 330 U. S. 501 ..... 14, 20
International Shoe Co. v. *Washington*, 326 U. S. 310, 15, 17, 18
International Textbook Co. v. *Pigg*, 217 U. S. 91 12
James Dickinson Co. v. *Harry*, 273 U. S. 119 15
Koster v. *Lumbermen Mutual Co.*, 330 U. S. 518 20
Michigan Central v. *Mix*, 278 U. S. 492 ..... 12, 13
Mt. Vernon Cotton Co. v. *Alabama Power Co.*, 240 U. S. 30 3
Nashville C. & St. L. Ry. v. *Walters*, 294 U. S. 405 3
Old Wayne Life Assn. v. *McDonough*, 204 U. S. 8 .... 15, 16
Ownbey v. *Morgan*, 256 U. S. 94 18
Pennoyer v. *Neff*, 95 U. S. 714 18
Philadelphia & Reading Ry. Co. v. *McKibbin*, 243 U. S. 264 15
Rescue Army v. *Municipal Court*, 331 U. S. 549 3
Riverside Mills v. *Menefee*, 237 U. S. 189 15
Rosenberg Co. v. *Curtis Brown Co.*, 260 U. S. 516 15
Senn v. *Tile Layers Union*, 301 U. S. 468 3
Simon v. *Southern Railway*, 236 U. S. 115 ..... 15, 16, 18
Sioux Remedy Co. v. *Cope*, 235 U. S. 197 12
Spoturno v. *Woods*, 8 W. W. Harr. 378 18
St. Clair v. *Cox*, 106 U. S. 350 ..... 16, 18
Western Union Tel. Co. v. *Kansas*, 216 U. S. 1 12

STATUTES CITED

Beale, Volume 1, "Conflict of Laws," 377-8 12
Constitution of the United States:

Article I, Section 8 ..... 3, 6, 12
Fourteenth Amendment 3, 6, 9

Corporation Calendar (United States Corporation Company), Vol. 39, No. 2, April, May, June, 1948 .. 20

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Page

Corporation Journal (The Corporation Trust Company), Vol. XVIII, No. 8, May, 1948, pp. 146-8 20
Hansell, "The Proper Forum for Suits against Foreign Corporations," 27 Col. L. Rev. 12, 14-5 14
McGowan "Litigation as a Burden on Interstate Commerce," 33 Ill. L. Rev. 875, 882 14
Prentice-Hall Corporation Letter for May, 1948 21

Revised Code of Delaware (1935):
Section 4610 17
Section 4631 ..... 1, 2, 3, 4, 5, 6, 8, 9, 17, 18, 21
Section 4634 ..... 18, 21

United States Code, Title 28:
Section 1257(2) 2, 3, 22
Section 1257(3) 2, 22
Section 2103 2

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

Nos. 529-530-531

STANDARD OIL COMPANY, A CORPORATION OF THE STATE OF INDIANA,

Appellant,

vs.

THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, AND THE HONORABLE FRANK L. SPEAKMAN, SITTING AS JUDGE OF SAID COURT, AND JACOB BLAUSTEIN,

---

JURISDICTIONAL STATEMENT

Preliminary Statement

The appeals are from final judgments of the Supreme Court of the State of Delaware denying appellant's application for writs of prohibition to the Superior Court of that State. The writs were sought to prevent the Superior Court from acting in excess of its jurisdiction in three actions commenced against appellant in that court under Section 4631 of the Revised Code of Delaware (1935), by means of writs of foreign attachment. No writs of summons were issued and no personal service of process upon

appellant (defendant in the Superior Court) purported to be made. Appellant was an Indiana corporation not doing business, and not authorized to do business, in Delaware. Plaintiffs in the Superior Court were a foreign corporation and non-residents of the State of Delaware. The causes of action asserted all arose outside the State of Delaware.

Appellant in each of the courts below questioned the validity of Section 4631 on the ground of its being repugnant to the Constitution of the United States and each court, in expressly passing upon this question, decided in favor of the validity of that Section.

The three Superior Court actions are identical except that there are different parties plaintiff in each and the proportion of the aggregate Fifty Million Dollars damages sought varies in each case. The three petitions for writs of prohibition raised identical questions, all were argued together and disposed of by the Delaware Supreme Court in a single opinion.[1]

Basis for Jurisdiction

A. *The Jurisdictional Statutes*

Jurisdiction of this Court is invoked by way of appeal under Section 1257(2) of Title 28, United States Code. Attention is also called to Sections 2103 and 1257(3) but appellant submits these cases are precisely within Section 1257(2) and appeals as of right accordingly lie.

B. *The Decisions Demonstrating Jurisdiction*

A judgment by the highest state court denying application for writ of prohibition to an inferior court to prevent

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[1] Citations to the certified transcript of record will be made to the printed record addressed to the first Superior Court action (Record in Nos. 1 and 4, February, 1948, Term of the Supreme Court of Delaware; that is the record in the case in which this Statement is entitled).

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action in excess of its jurisdiction is a final judgment from which an appeal to this Court, in an appropriate case, may be brought under the foregoing statutory provisions. *Mt. Vernon Cotton Co.* v. *Alabama Power Co.*, 240 U. S. 30, 31; *Stadelman* v. *Miner*, 246 U. S. 544; *Michigan Central* v. *Mix*, 278 U. S. 492, 494; *Bandini Co.* v. *Superior Court*, 284 U. S. 8; *Consol. Textile Co.* v. *Gregory*, 289 U. S. 85; see *Rescue Army* v. *Municipal Court*, 331 U. S. 549.

The Supreme Court of Delaware, as well as the Superior Court, expressly passed upon and denied appellant's claim that Section 4631 of the Revised Code of Delaware (1935), as construed by those courts,[2] was repugnant to the Constitution of the United States in that it violated (a) the commerce clause (Art. I, § 8) and (b) the due process clause of the Fourteenth Amendment.

Such action by the highest court of Delaware expressly sustaining the validity of Section 4631 as against the above stated constitutional challenge brings these appeals properly before this Court under Section 1257(2) of Title 28, United States Code. *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282; *Cudahy Co.* v. *Parramore*, 263 U. S. 418, 422; *Alabama Ry.* v. *Jackson Ry.*, 271 U. S. 244, 247; *Fiske* v. *Kansas*, 274 U. S. 380, 385; *Furst* v. *Brewster*, 282 U. S. 493; *Consol. Textile Co.* v. *Gregory*, 289 U. S. 85; *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405; *Senn* v. *Tile Layers Union*, 301 U. S. 468, 476-7; see *Charleston Assn.* v. *Alderson*, 324 U. S. 182, 185-6.

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[2] As construed below, Section 4631 conferred jurisdiction upon the Superior Court to compel appellant to appear and defend the actions commenced under that Section or, in default of such appearance, to enter judgments as demanded by the declarations. The claims in the three actions aggregated $50,000,000 (pp. 54, 63-4 of each record). The default judgments would be satisfied out of the 3,697,000 shares of stock attached (p. 32 of each record).

The Statute of the State of Delaware Which Is Claimed to Be Repugnant to the Constitution of the United States

Section 4631 of the Revised Code of Delaware (1935) printed at page 978 of the official edition reads as follows:

> "A writ of foreign attachment may be issued out of the Superior Court of this State against any corporation, aggregate or sole, not created by or existing under the laws of this State, upon affidavit made by the plaintiff or any other credible person, and filed with the Prothonotary of said Court, that the defendant is a corporation not created by, or existing under the laws of this State, and is justly indebted to the said plaintiff in a sum of money, to be specified in said affidavit, and which shall exceed fifty dollars.
>
> "The said writ shall be framed, directed, executed and returned, and like proceedings had as in the case of a foreign attachment issued under the next foregoing section, except that attachments to be issued under this section shall be dissolved only in the manner hereinafter provided.
>
> "In any attachments to be issued under this section, judgment shall be given for the plaintiff at the second term after the issuing of the writ, unless the defendant shall have caused an appearance by attorney to be entered, in which case the like proceedings shall be had, as in suits commenced against a corporation by summons; Provided, however, if the defendant in the attachment or any sufficient person for him, shall, at any time before judgment, give security for the payment of any judgment that may be recovered in said proceedings with costs, then the garnishees and all the property attached, shall be discharged, and the attachment dissolved, and like proceedings be had as in other cases of foreign attachment, in which the attachment has been dissolved by special bail. Such security shall be approved, and the form and amount thereof determined by the Court in term time, or by any judge

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thereof, in vacation; but the court may prescribe the form of such security by general rule in that behalf."

The Date of Judgments and Applications for Appeal

The judgments which are sought to be reviewed were made and entered on the 30th day of December, 1948. The applications for appeal were presented on the 21st day of January, 1949, and were allowed on the 21st day of January, 1949.

Statement as to the Nature of the Cases, Stage of Proceedings and Manner in Which the Constitutional Question Was Raised in the Courts Below

On April 17, 1945, writs of foreign attachment against appellant were secured in three actions, instituted in the Superior Court of Delaware, purporting to sound in covenant (R. 31). Plaintiffs who obtained these writs of foreign attachment are the private respondents here as well as in the writ of prohibition proceedings in the Supreme Court of Delaware.[3]

The writs of foreign attachment purported to be issued solely by virtue of the aforesaid Section 4631 of the Revised Code of Delaware.

The Sheriff purported to execute the writs of attachment by serving certified copies thereof in Wilmington, Delaware, on the statutory agent of a Delaware corporation of whose stock appellant was an owner (R. 32). Thereafter, plaintiffs in the Superior Court actions filed their declarations (R. 43), and appellant, under special appearance, moved to

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[3] In Superior Court action No. 136, the plaintiff is Jacob Blaustein, a non-resident of Delaware; in Superior Court action No. 137, the plaintiffs are Jacob Blaustein, Henrietta Blaustein, Fanny B. Thalheimer and Ruth B. Rosenberg (non-residents of Delaware), Executors of Louis Blaustein, deceased; in Superior Court action No. 138, the plaintiff is American Trading and Productions Corporation, a Maryland corporation.

vacate the attachments for reasons appearing upon the face of the record (R. 34). Appellant's motion was granted by the Superior Court (R. 97, 121) but this determination was reversed (R. 127, 161) by the Supreme Court of Delaware with leave to apply to the Superior Court for permission under another special appearance to raise additional questions based upon certain facts *de hors* the record (*Blaustein* v. *Standard Oil Co.*, 49 A. 2d 726 [R. 127] and 51 A. 2d 568 [R. 151]).

In the mandate entered upon the decision just cited, the Supreme Court of Delaware directed that judgments *nisi* be entered by the Superior Court against appellant in each of the Superior Court actions (R. 162). After the entry of these judgments (R. 165), the Superior Court granted leave (R. 177, 199) to petitioner, under special appearance, to move to dismiss the attachment proceedings and vacate the judgments *nisi* for reasons involving, among others, the specific claim that Section 4631 of the Revised Code of Delaware, if construed to authorize the attachments made in the Superior Court and the judgments *nisi* entered as a result thereof, was to that extent invalid and repugnant to the Constitution of the United States in that it violated the commerce clause (Art. I, § 8) and the due process clause of the Fourteenth Amendment (R. 201, 204).

The Superior Court denied appellant's motions and specifically upheld the validity of Section 4631 as against appellant's contention that it was repugnant to the Constitution of the United States (R. 242, 261-72). A copy of the Superior Court opinion is annexed hereto as Exhibit A.

By virtue of the fact that appellant was faced with the alternative either of having the judgments *nisi* against it made absolute or of waiving its constitutional contentions by entering a general appearance and proceeding with a lengthy and costly trial of the claims set forth in the decla-

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rations in the three Superior Court actions,[4] it applied to the Supreme Court of Delaware (R. 1, 13), under the procedure recognized in that state, for writs of prohibition to prohibit the Superior Court from continuing to exercise purported jurisdiction over the defendant under the writs of foreign attachment which alone afforded any claimed basis for jurisdiction by the Superior Court. The Supreme Court thereupon stayed the proceedings in the Superior Court and extended appellant's time to enter a general appearance until further order of the Court (R. 281).

The petitions for writs of prohibition expressly raised the constitutional points upon which appellant now relies, as follows (R. 10, 22-3):

> "Should Section 4631 of the Revised Code of Delaware (1935) be construed, independently of any provision of the Constitution of the United States, to confer jurisdiction upon the Superior Court to enter judgment against petitioner for want of an appearance, and to hear and determine the proceeding notwithstanding the facts stated in paragraph (4) hereof, then Section 4631, so construed, is invalid in that it violates (1) the commerce clause of Article I, Section 8 of the Constitution of the United States by imposing an unreasonable obstruction and an undue burden upon interstate commerce as conducted by the petitioner, and (2) the due process clause of the Fourteenth Amendment to the Constitution of the United States by depriving the petitioner of its property without due process of law."

The Supreme Court of Delaware, however, entered judgments denying the petitions for writs of prohibition and dismissing the petitions on the merits. In so doing, that

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[4] The Superior Court found as a fact that this litigation "would be particularly burdensome to defendant as well as to the courts and taxpayers of the State of Delaware for it involves issues of tremendous magnitude and may require the taking of thousands of pages of testimony and the calling of a very large number of witnesses, none of whom resides in Delaware" (Finding 7, R. 245).

court wrote an opinion wherein it expressly passed upon appellant's claims as to the invalidity of Section 4631 under the Constitution of the United States and decided in favor of the validity of that statute (Exh. B, pp. 60-6, *infra*). The opinion of the Supreme Court is annexed hereto as Exhibit B.

It is from the aforesaid judgments of the Supreme Court of Delaware denying the petitions for such writs of prohibition that these appeals are taken.

The Questions Presented Are Substantial

Two issues of constitutional law are presented by these appeals from the decisions below.

1. Both courts below found as facts that the causes of action in the original cases, instituted by foreign attachment under Section 4631, did not arise in Delaware and that the cases were instituted by non-residents of Delaware against the appellant, a foreign corporation not qualified to do business in Delaware and actually doing no business in Delaware (Exh. B, pp. 50-1, *infra;* R. 243, 270).

The courts below also found as a fact that the exercise of jurisdiction under these circumstances over the defendant, a corporation engaged extensively in interstate commerce, "would impair substantially the efficiency of petitioner's [appellant's] interstate operations as well as cause, directly and indirectly, heavy expense to the petitioner" (Exh. B, p. 61, *infra;* R. 245).

In spite of these findings the courts below held that Section 4631 was constitutional. In reaching this conclusion they held that only foreign corporations engaged in interstate commerce as common carriers for hire could invoke the protection of the doctrine well established in this Court that, to require a foreign corporation under the circumstances in these cases to appear and defend itself, consti-

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tutes an undue burden upon interstate commerce (Exh. B, pp. 60-5, *infra;* R. 261-66). As appellant, while a carrier in interstate commerce, was concededly not a common carrier, the constitutionality of Section 4631 was upheld.

The correctness of such a ruling is the first question presented.

2. The courts below also found that the aforesaid litigation would be "particularly burdensome" to appellant for it involved "issues of tremendous magnitude", might "require the taking of thousands of pages of testimony and the calling of a very large number of witnesses, none of whom resides in Delaware" (Exh. B, pp. 61-2, *infra;* R. 245). Moreover, the causes of action alleged against appellant were ordinary contract causes of action having no relation to the property attached (R. 43-64).

The Supreme Court of Delaware in its opinion concluded, however, that the decisions in this Court protecting foreign corporations under the circumstances here disclosed from the exercise of state jurisdiction applied only to actions *in personam,* commenced by writs of summons, whereas in these cases the actions were commenced by writs of attachment under Section 4631 (Exh. B, pp. 65-6). Accordingly, it was held that Section 4631 was not subject to the constitutional limitations of the Fourteenth Amendment in so far as they related to the exercise of jurisdiction over foreign corporations upon foreign causes of action (*ibid.*).

The correctness of this ruling presents the second issue.

A. *The Interstate Commerce Question*

All facts material to a discussion of the constitutional questions under this subdivision A and subdivision B were found in appellant's favor by the Superior Court (R. 243-5) and not questioned by the Supreme Court of Delaware

which specifically reaffirmed the salient findings (Exh. B, pp. 50-1, 60-2, *infra*).

In addition to finding that the plaintiffs in the Superior Court actions were a foreign corporation or non-residents of Delaawre (Finding 1, R. 243, 270; Exh. B, p. 50, *infra*), that appellant was an Indiana corporation not doing business, and not qualified to do business, in Delaware (Finding 2, R. 243; Exh. B, p. 50, *infra*) and that the alleged covenants upon which the actions are based were executed outside of Delaware and the alleged breaches thereof occurred outside of Delaware (Finding 3, R. 243-4; Exh. B, pp. 50-1, *infra*), the Superior Court made the following significant findings, which were reiterated by the Supreme Court (Findings 5, 6, 7, R. 244-5; Exh. B, pp. 61-2, *infra*):

> "5. The defendant carries on a large interstate business in the middlewest consisting of the refining of crude oil into petroleum products in Illinois, Indiana, Missouri, Kansas and Wyoming, and the marketing of such products not only in the five mentioned states but in ten other states. In addition to this general interstate business the defendant is specifically engaged on a large scale in the interstate transportation of its products. To this end defendant maintains hundreds of miles of interstate pipe lines, interstate barge lines, interstate tanker lines and interstate trucking lines. These lines move millions of barrels of petroleum products in interstate commerce.
>
> "6. In connection with defendant's business there are presented against defendant annually in excess of 2,500 claims or causes of action for personal injuries and property damage. In many of such cases defendant deems it imperative or advisable to leave the determination of its liability with respect to such claims to the courts. More than 75% of such claims involve facts known to employees of defendant directly engaged in defendant's interstate transportation operations. The trial of claims requires the presence of such employees

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as witnesses. If the State of Delaware should assume jurisdiction over claims against defendant by virtue of Delaware's attachment statutes, litigation of such claims would entail long absence of defendant's officers and employees from their customary occupations in connection with testifying in such Delaware litigation and would impair substantially the efficiency of defendant's interstate operations as well as cause, directly and indirectly, heavy expenses to the defendant.

"7. The present litigation would be particularly burdensome to defendant as well as to the courts and taxpayers of the State of Delaware for it involves issues of tremendous magnitude and may require the taking of thousands of pages of testimony and the calling of a very large number of witnesses, none of whom resides in Delaware."

The extent of appellant's direct operations in interstate commerce is tremendous and exceeds that of many business enterprises engaged exclusively in the transportation field. The details appear in the record (R. 210-23). Suffice it here to say that petitioner owns and operates over 1,000 miles of interstate pipe line (R. 211, 220); owns and operates a river barge line covering routes in interstate commerce of 1,349 miles in length (R. 211-2); owns and operates a fleet of lake tanker ships plying regularly established routes in interstate commerce of approximately 2,614 miles (R. 212-3); owns and operates three fleets comprising more than 100 large trucks covering in excess of two million miles of interstate transportation in the course of a calendar year (R. 213-20). These transportation systems carry millions of barrels of appellant's petroleum products from its refineries or distributing terminals to retail outlets and customers (R. 211-21).

Under these circumstances, the purported exercise of jurisdiction by Delaware, by virtue of Section 4631 of the Revised Code of Delaware (1935), over the defendant for-

eign corporation, at the behest of non-resident plaintiffs upon foreign alleged causes of action, constitutes such an unreasonable interference with and burden upon interstate commerce that Section 4631, as here applied, plainly violates and is repugnant to the commerce clause (Art. I, § 8) of the Constitution of the United States. *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282; *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197; *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312; *Atchison Ry. Co.* v. *Wells*, 265 U. S. 101; *Michigan Central* v. *Mix*, 278 U. S. 492; *Denver & R. G. W. R. Co.* v. *Terte*, 284 U. S. 284.

The commerce clause provides:

> "The Congress shall have Power • • •
>
> "To regulate Commerce with foreign Nations and among the several States and with the Indian Tribes;"

By virtue of this delegation of authority to the Federal Government, this Court has, under a variety of circumstances, held unconstitutional state laws which by direct regulation, taxation or otherwise, unduly obstructed or burdened commerce among the several states. See, *e. g.*, *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 111; *Buck Stove Co.* v. *Vickers*, 226 U. S. 205, 216; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307; *Best & Co.* v. *Maxwell*, 311 U. S. 454; *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1.

In pursuance of the policy expressed by the foregoing decisions, this Court has struck down state statutes which required submission of a foreign corporation to jurisdiction of a state court as a condition to invoking state judicial process in its favor. *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282; *Furst* v. *Brewster*, 282 U. S. 493; *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197, 205.

Specifically following the last cited decision, this Court has held unconstitutional state statutes conferring upon

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state courts, with respect to foreign causes of action, jurisdiction to entertain actions against a foreign corporation actively engaged in interstate commerce and not qualified in the state seeking to exercise jurisdiction. *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312; *Michigan Central* v. *Mix*, 278 U. S. 492.

This precise doctrine has likewise been applied to hold unconstitutional, by reason of the interstate commerce clause, state foreign attachment statutes similar to Section 4631 of the Revised Code of Delaware (1935), when construed to confer upon state courts with respect to foreign causes of action, jurisdiction to entertain actions against a foreign corporation actively engaged in interstate commerce and not qualified in the state seeking to exercise jurisdiction. *Atchison Ry. Co.* v. *Wells*, 265 U. S. 101; *Denver & R. G. W. R. Co.* v. *Terte*, 284 U. S. 284.

The facts found by the Delaware Superior Court (R. 243-5) in the actions here involved are almost in *haec verba* the facts upon which this Court based its decision in *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312 and in other cases just cited, which specifically follow that decision and apply it to attachment statutes.

Indeed, neither the Superior Court nor the Supreme Court of Delaware in their opinions found any factual difference between the Superior Court cases here involved and the decisions just cited but the courts below came to the conclusion that the authorities of this Court were limited in scope to situations in which the defendant was a "common carrier for hire." As the appellant was not such a carrier, but was a carrier of its own products in interstate commerce, it was held that the protection of the commerce clause, as construed by *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312, and the cases following that decision, could

not be invoked by appellant (R. 261-6; Exh. B, pp. 60-5, *infra*).

Nothing in the language of the commerce clause permits such a limitation. That clause applies alike to all enterprises engaged in interstate commerce, whether public carriers, private carriers or interstate enterprises which do not fall within either category. Indeed, this Court recently, in citing *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312, did so for the very general proposition that it had "held the use of an inappropriate forum in one case an unconstitutional burden on interstate commerce." *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 505.

The text and law review authorities are in accord that the doctrine of *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312, is not limited and cannot be limited to carriers for hire. Hansell, "The Proper Forum for Suits against Foreign Corporations," 27 Col. L. Rev. 12, 14-5; McGowan, "Litigation as a Burden on Interstate Commerce," 33 Ill. L. Rev. 875, 882; 1 Beale, "Conflict of Laws," 377-8.

The decision of this Court in *Champlin Rfg. Co.* v. *United States*, 329 U. S. 29, 32, 34, demonstrates that the interstate transportation activities of appellant are interstate commerce of the type which was protected by the doctrine established in *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312, and similar decisions above cited.

The finding of fact in the present cases made by the Superior Court and adopted by the Supreme Court that the exercise of jurisdiction under Section 4631 "would impair substantially the efficiency of defendant's interstate operations as well as cause, directly and indirectly, heavy expenses to defendant" (Finding 6, R. 245; Exh. B, p. 61, *infra*) would seem conclusively to establish that a proper case for the application of the commerce clause to strike down Section 4631 has been made out.

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This appeal, accordingly, raises the very substantial question of whether the protection of the commerce clause against the exercise of jurisdiction by a state over a foreign corporation actively engaged in that commerce may be limited to common carriers for hire or whether, as appellant contends, the clause applies equally to all enterprises actually engaged to a substantial extent in interstate commerce, including a private carrier.

B. *The Due Process of Law Question*

The second substantial question presented is whether Section 4631, as construed by the courts below, to authorize the attachments in the Superior Court actions in order to compel the defendant, a foreign corporation doing no business in Delaware, and having given no consent to be sued there, to defend litigation instituted by non-residents upon foreign causes of action lays "too great and unreasonable burden on the corporation [appellant] to comport with due process."[5] *Internat. Shoe Co.* v. *Washington*, 326 U. S. 310, 317. The findings of the Superior Court and Supreme Court in the cases here involved were that each "would be particularly burdensome to defendant [appellant] • • • for it involves issues of tremendous magnitude and may require the taking of thousands of pages of testimony and the calling of a very large number of witnesses, none of

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[5] This quotation is in accord with the unbroken authority of this Court relating to suit against a foreign corporation neither qualified to do business in a state nor doing business there. *Riverside Mills* v. *Menefee*, 237 U. S. 189; *Phila. & Reading Ry. Co.* v. *McKibbin*, 243 U. S. 264; *Rosenberg Co.* v. *Curtis Brown Co.*, 260 U. S. 516; *James Dickinson Co.* v. *Harry*, 273 U. S. 119, 122; *Consol. Textile Co.* v. *Gregory*, 289 U. S. 85. See also *Simon* v. *Southern Railway*, 236 U. S. 115, *Old Wayne Life Ass'n* v. *McDonough*, 204 U. S. 8.

whom resides in Delaware" (Finding 7, R. 245; Exh. B, pp. 61-2, *infra*).[6]

Originally, it was well established that a foreign corporation could not be sued at all outside of the state by which it was chartered. *St. Clair* v. *Cox*, 106 U. S. 350, 354. As corporations entered more and more into multi-state activities, the necessity of permitting suit against them in other states compelled a modification of the doctrine. It was then held that a state might, as a condition to permitting a forign corporation to come within its boundaries, compel that corporation "to stipulate that in any litigation arising out of its transactions in the State, it will accept as sufficient the service of process on its agents or persons specially designated." *St. Clair* v. *Cox*, 106 U. S. 350, 356. The doctrine thus was limited to litigation against a foreign corporation doing business in a state with respect to claims arising out of that business.

Subsequently, a state was permitted to exercise jurisdiction over a foreign corporation, qualified to do business in that state, even with respect to foreign causes of action, if the corporation's *express* consent to be sued was broad enough to include such causes of action.

Where, however, a state has purported to exercise jurisdiction over a foreign corporation as a result of its *implied* consent to be sued derived merely from its presence in the jurisdiction, without qualification, the right to exercise such jurisdiction has been limited to local causes of action. *Simon* v. *Southern Railway*, 236 U. S. 115, 129-30; see also *Old Wayne Life Ass'n* v. *McDonough*, 204 U. S. 8.

The constitutional limitations upon the exercise of jurisdiction by state courts over foreign corporations were

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[6] This finding certainly does not overstate the case as the magnitude of a previous unsuccessful similar litigation, brought by the same plaintiffs against appellant and others in New York, demonstrates (R. 226-7, 239-40).

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summarized by the late Chief Justice Stone in *Internat. Shoe Co.* v. *Washington*, 326 U. S. 310, 316-7, where jurisdiction was upheld as to a local cause of action. The opinion, however, concluded that a corporation which was not present within a state in the usually accepted sense could not constitutionally be subjected to suit on causes of action unconnected with its activities in the forum; "To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process" (326 U. S. 317). As appellant does no business whatever in Delaware, and is not qualified to do business there, actions brought against it by non-residents of Delaware upon foreign causes of action would seem to come within the constitutional prohibition.

The mere fact that the Superior Court actions here involved were commenced by attachment rather than by summons should make no difference in the application of the foregoing principles. The actions in question are not actions *in rem*. The complaints purport to allege ordinary contract causes of action and the only judgments sought are for money damages (R. 43-64). The process of attachment (R. 31) under Section 4631 is invoked as the attachment law of Delaware specifically provides, for the purpose of exercising compulsion upon the defendant "so that he be and appear at the next Superior Court, to answer the plaintiff's demand" (Section 4610, Revised Code of Delaware [1935] p. 976). Whether the action be commenced by writ of summons or writ of attachment, the defendant must appear in the same manner and all proceedings after appearance are identical.[7]

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[7] Other provisions of the Attachment Law specifically provide for the appearance of the defendant "after the issuance of the writ of foreign attachment in the same manner as appearances are entered in cases com-

Under these circumstances, we submit that the rule of *Denver & R.G.W.R. Co.* v. *Terte*, 284 U. S. 284, 287, is applicable. *In that case this Court held that for purposes* of constitutional safeguards against the exercise of state court jurisdiction it made no difference whether an action were commenced by the process of summons or attachment. The question of whether a statute (Section 4631) compelling appellant to defend litigation in Delaware lays "too great and unreasonable a burden on the corporation to comport with due process"[8] "Obviously • • • has no relation to the nature of the process used to bring it before the court."[9]

Indeed, both this Court and the Supreme Court of Delaware have recognized that jurisdiction derived from attachment of a non-resident's property under the Delaware attachment laws is founded upon his implied "consent that the state may subject such property to judicial process to answer demands made against him in his absence" (*Spoturno* v. *Woods*, 8 W. W. Harr. 378, 387; *Ownbey* v. *Morgan*, 256 U. S. 94, 111). This implied consent by a foreign corporation to be sued must, for constitutional purposes, be subject to the same limitations as the implied consent of a foreign corporation to be sued by reason of its presence within a state without qualification. Such implied consent, as we have shown, is limited to suits upon domestic causes of action.[10] *Simon* v. *Southern Railway*, 236 U. S. 115.

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menced by summons" and also provide that after appearance "like proceedings shall be had as in cases begun by summons" (Section 4634, Revised Code of Delaware [1935], p. 979).

[8] *Internat. Shoe Co.* v. *Washington*, 326 U. S. 310, 317.

[9] *Denver & R. G. W. R. Co.* v. *Terte*, 284 U. S. 284, 287.

[10] Furthermore, this Court, in *St. Clair* v. *Cox*, 106 U. S. 350, 351, and in *Pennoyer* v. *Neff*, 95 U. S. 714, 723, seems to have recognized that the propriety of commencing actions by foreign attachments against non-residents must be limited, if not to local causes of action, at least to residents of the forum which provides the remedy.

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The decision of the Supreme Court of Delaware abandons substance for form. It is based exclusively on the fiction embodied in the phrase "*quasi in rem*"—somewhat of a paradox in itself. The Delaware court holds that the rules of due process of law applicable to actions against corporations may not be invoked if an ordinary law action is commenced by writ of attachment rather than by writ of summons. The application of the label "action *quasi in rem*," according to the Delaware court, transforms what would otherwise be a plainly unconstitutional exercise of jurisdiction into an eminently proper one. Such a distinction based upon long discarded principles of immutability of common law writs and special pleading should not be allowed to stand.

C. *The Public Importance of Both Questions*

The foregoing demonstrates, we respectfully submit, that there are involved in these appeals two substantial constitutional questions. Aside from the importance of the questions in this particular litigation, it is plain that substantial constitutional issues of general public importance are here raised.

The doctrine announced by the courts below that the protection of the interstate commerce clause against the exercise of state court jurisdictions may be invoked only by common carriers for hire is not only novel but of great potential danger. The limitation of the very general language of the commerce clause so that it may in this type of case be invoked to protect only a very narrow segment of interstate commerce should not be permitted to stand as a judicial precedent.

Of equal general public importance is the issue presented by the decision below on the due process point. It would be a dangerous precedent, we submit, to hold that technical distinctions between one process and another, without more,

could determine the applicability of the due process clause. If an action may not be commenced by summons against a foreign corporation because of the undue burden of defending in a foreign jurisdiction having no connection with the alleged cause of action, then it would seem equally plain that such defense should not be compelled by the process of attachment under a statute which merely substitutes that process for the process of summons.

If the technical distinction made by the court below is sound, the substantive protection accorded by the Fourteenth Amendment may easily be evaded by a substitution of technical forms. Not only is the decision below contrary to the principle established in *Denver & R. G. W. R. Co.* v. *Terte*, 284 U. S. 284, 287, *supra*, but is also contrary to the recent trend of decisions in this Court. *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501; *Koster* v. *Lumbermens Mutual Co.*, 330 U. S. 518. While the decisions just cited deal with questions of *forum non conveniens*, the language, particularly of the *Gulf Oil Corp.* case is very similar to that in *Simon* v. *Southern Railway*, 236 U. S. 115, 129-30, where constitutional limitations upon the exercise of jurisdiction were involved.

The importance of the questions presented on this appeal and the far reaching consequences of the decision below are attested by the interest which the decision of the Delaware Superior Court, now in effect affirmed by the Supreme Court, attracted in current periodicals dealing with corporate matters. The decision was summarized in The Corporation Journal (The Corporation Trust Company), Vol. XVIII, No. 8, May, 1948, pp. 146-8.

The decision received comment in the Corporation Calendar (United States Corporation Company) Vol. 39, No. 2, April, May, June, 1948. After pointing out that the alleged cause of action did not arise in Delaware and that the defendant (the appellant here) was a foreign corporation not quali-

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fied in Delaware and doing no business there, it was stated "This case seems of much importance and probably would be reviewed by higher courts."

In the Prentice-Hall Corporation Letter for May, 1948, the following comment appears:

> *"Delaware Catches Foreign Corporation*
>
> "Suppose an Illinois corporation does business all over the United States, except in Delaware. It has its home office in Chicago, where its officers, records and employees are located. Let's say it owns stock in a Delaware corporation. Say a California stockholder or customer wants to sue the corporation for damages for breach of contract. If he is willing to go to Delaware, may he sue the corporation there? Yes, says a Delaware court [Blaustein *v.* Standard Oil Co., 56 A. (2d) 772, ¶ 20, 152].
>
> "SIGNIFICANCE The decision is loaded with dynamite. Unless reversed, anybody with a claim may, by attaching in Delaware stock of a Delaware corporation owned there by a foreign company, sue the foreign corporation in Delaware. (Of course, the plaintiff's recovery can be satisfied only out of the stock.[11]) Such suit, or the mere threat of action, may be sufficient to force the company into an otherwise unjustifiable settlement. Or, if the corporation decides to fight, it may have to drag its personnel and records thousands of miles from its main office to Delaware."

The far reaching effect of the decision of the Delaware court can hardly be exaggerated. Examples such as those cited in the above quotation could be greatly multiplied. Appellant might be required, by the coincidence of its ownership of some stock of a Delaware corporation, to defend hundreds or perhaps thousands of lawsuits in Dela-

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[11] The Commentator overlooks the fact that defense would be possible only under a general appearance which would result in judgment *in personam* for the full amount, if any, recovered (Rev. Code Del. [1935] §§ 4631, 4634).

ware brought by non-residents of Delaware, upon causes of action arising hundreds or thousands of miles away from Delaware, by the mere expedient of serving a writ of attachment upon the statutory agent in Delaware of the corporation, whose stock is owned by appellant. Other corporations similarly situated would be similarly affected.

Conclusion

This Court, therefore, has jurisdiction of this appeal under Section 1257(2) of Title 28, United States Code, and, in addition, a proper case for writ of certiorari under Sections 1257(3) and 2103 is made out.

Dated, January 17, 1949.

Respectfully submitted,

HUGH M. MORRIS,
RALPH S. HARRIS,
JOHN R. MCCULLOUGH,
FREDERICK W. P. LORENZEN,
Attorneys for Appellant.

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EXHIBIT A

SUPERIOR COURT FOR NEW CASTLE COUNTY, MAY TERM, 1945

No. 136

JACOB BLAUSTEIN

v.

STANDARD OIL COMPANY, a Corporation of the State of Indiana

( )

SPEAKMAN, *J.*, sitting:

Clarence A. Southerland, Aaron Finger and Caleb S. Layton, all of Wilmington, (Nathan L. Miller and Karl F. Steinman, both of New York, on the brief), for plaintiff.

Hugh M. Morris and Edwin D. Steel, Jr., both of Wilmington (Ralph S. Harris, John R. McCullough and Frederick W. P. Lorenzan, all of New York, and S. Samuel Arsht, of Wilmington, on the brief), for defendants under special appearance for defendant.

Motion of defendant under special appearance to vacate judgment nisi and to dismiss attachment proceedings in which shares of stock in a Delaware corporation had been attached.

This case is once more before this Court upon facts and a motion based thereon, neither of which need be set out in entirety. Prior to the present motion they appear in the original proceedings in this Court, reported Terry (Del.) , 45 A. 2d 527 and 533, upon writ of error in the Supreme Court, reported in Terry (Del.) , 49 A 2d 726, and Terry (Del.) , 51 A. 2d 568, and, following remand to this Court, in Terry (Del.) , 54 A. 2d 596.

The motion was heard by the Court, upon affidavits. This procedure was followed by agreement of counsel representing the parties.

The plaintiff's declaration and the affidavits and exhibits of the parties are lengthy. The defendant has set out in its brief a summary of undisputed facts. It is not apparent to me that the correctness of the summary is questioned by the plaintiff. I believe that it fairly states the essential facts necessary for the consideration of the pending motion, and it will be accepted for that purpose. With the deletion of accompanying comment and a few immaterial changes, those facts are as follows:

1. Plaintiff, Jacob Blaustein, is not a resident of Delaware, but is a resident of Maryland.

2. Defendant, Standard Oil Company, is an Indiana corporation. It is not and at no time material to this motion was qualified to do business in Delaware. It owns and owned no tangible property in this State. At all times material it has maintained its principal executive offices in Chicago, Illinois, and has transacted its business in some fifteen middle western states. During all times material it has had no officers, directors, employees or agents in Delaware, and has had all of its executive officers and directors in Chicago, Illinois. During all times material its directors met principally in Illinois and never in Delaware.

3. The alleged cause of action declared upon purports to sound in covenant and is based upon alleged breaches of an instrument executed by the parties thereto outside of Delaware. The alleged breaches relate to the alleged failure of defendant to cause Pan American Petroleum & Transport Company, hereinafter referred to as "Pan Am", to acquire an oil refinery and oil producing properties and to the failure of defendant to use its best efforts and personnel to assist Pan Am in obtaining the latter. It was never contemplated by the parties to the alleged covenant that the refinery should be constructed or acquired in Delaware but, on the contrary, it was contemplated that a refinery should be built in Texas City, Texas, where large refineries have, in fact, been constructed by Pan Am. With respect to the crude oil producing properties, likewise, it was never contemplated that any such property should be acquired by Pan Am in Delaware, but, on the contrary, it was contem-

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plated that such property should be acquired in Texas or possibly, according to the plaintiff's position in a prior litigation, in Louisiana, in which states crude oil producing properties have, in fact, been acquired by Pan Am.

4. Pan Am is a Delaware corporation, but except for its incorporation in Delaware and the maintenance of its statutory office, with the Corporation Trust Company as its agent, in Delaware, during all times material, has conducted no marketing operations or other business in Delaware. Its ownership of some real estate in Delaware acquired after the alleged causes of action are claimed to have arisen has been a nominal ownership only, for the small amount of real estate owned has been under long-term lease to American Oil Company. Likewise, a fleet of six tankers, acquired by Pan Am after the alleged causes of action herein are claimed to have arisen, while registered from Wilmington, is under charter to The American Oil Company and the tankers are utilized by that company and not by Pan Am. During the time when it is claimed that the alleged breaches of covenant took place Pan Am held no directors' or stockholders' meetings in Delaware. During such time the by-laws of Pan Am specifically provided "all meetings of stockholders for the election of directors shall be held in the City of New York" and such meetings were during that time in fact held there.

5. The defendant carries on a large interstate business in the middlewest consisting of the refining of crude oil into petroleum products in Illinois, Indiana, Missouri, Kansas and Wyoming, and the marketing of such products not only in the five mentioned states but in ten other states. In addition to this general interstate business the defendant is specifically engaged on a large scale in the interstate transportation of its products. To this end defendant maintains hundreds of miles of interstate pipe lines, interstate barge lines, interstate tanker lines and interstate trucking lines. These lines move millions of barrels of petroleum products in interstate commerce.

6. In connection with defendant's business there are presented against defendant annually in excess of 2,500

claims or causes of action for personal injuries and property damage. In many of such cases defendant deems it imperative or advisable to leave the determination of its liability with respect to such claims to the courts. More than 75% of such claims involve facts known to employees of defendant directly engaged in defendant's interstate transportation operations. The trial of claims requires the presence of such employees as witnesses. If the State of Delaware should assume jurisdiction over claims against defendant by virtue of Delaware's attachment statutes, litigation of such claims would entail long absence of defendant's officers and employees from their customary occupations in connection with testifying in such Delaware litigation and would impair substantially the efficiency of defendant's interstate operations as well as cause, directly and indirectly, heavy expenses to the defendant.

7. The present litigation would be particularly burdensome to defendant as well as to the courts and taxpayers of the State of Delaware for it involves issues of tremendous magnitude and may require the taking of thousands of pages of testimony and the calling of a very large number of witnesses, none of whom resides in Delaware.

SPEAKMAN, Judge:

The first point presented by the defendant is that Section 4631 of the Revised Code of Delaware (1935) does not authorize a writ of attachment to issue upon a foreign cause of action at the behest of a foreign plaintiff against a foreign corporation not qualified in Delaware, and doing no business in Delaware.

The pertinent paragraph of Section 4631 is as follows:

> "A writ of foreign attachment may be issued out of the Superior Court of this State against any corporation, not created by or existing under the laws of this State, upon affidavit made by the plaintiff or any other credible person, and filed with the Prothonotary of said Court, that the defendant is a corporation not created by, or existing under the laws of this State, and is justly indebted to the said plaintiff in a sum of money

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to be specified in said affidavit, and which shall exceed fifty dollars."

The defendant's position with respect to this language is that it is of a most general character and that it does not specifically authorize attachment to issue in an action by a non-resident plaintiff against a foreign corporation, not doing business here, upon an alleged cause of action arising outside of the State. It contends that the decisions both in this State and elsewhere require a construction excluding the present attachment from the ambit of Section 4631. It says it is not unusual for a court to read substantial limitations into a statute which deals only in the most general terms with the subject matter involved, and it directs attention to the language of the Supreme Court of this State, in Eastern Un. Co., v. Moffat Tunnel Imp. Dist., 6 W. W. Harr. (36 Del.) 488, 178 A. 864, at 870, where in addressing itself to Section 4631, the Court said:

"• • • courts are constantly engaged in reading exceptions into statutes of general application when the excepted cases are adjudged by them not to have been intended within the scope of the statute's generality of expression."

For the purpose of illustrating the principle of construction relied upon, the defendant cites a previous decision of the Supreme Court in the instant case, Blaustein v. Standard Oil Co., Terry (Del.) , 51 A. 2d 568, at 571; Spoturno v. Woods, 8 W. W. Harr. (38 Del.) 378; 192 A. 689, and Smith v. Armour & Co., 1 Penn. 361, 40 A. 720.

I understand that the plaintiff does not dispute the soundness of the rule, but that he denies that it h any application to the question under consideration.

The defendant says that in determining the meaning of Section 4631, it is important to consider Section 4608 of the Code of 1935. This section provides:

"All corporations doing business in this State, except banks, savings institutions and loan associations are subject to the operations of the attachment laws of the State of Delaware, as provided in the

> case of individuals; but insurance companies shall not be liable to attachment except only as to money due in consequence of the happening of the risk provided for in the policy of insurance; and said corporation [s] shall be liable to be summoned as garnishee, for which purpose service of the summons upon the President, Treasurer, Cashier, Paying Clerk, any Director, or the registered agent, as provided in other attachment cases, shall be sufficient to render the corporation subject to all the liabilities provided by the aforesaid laws; and the answer of the officers or agents so served with attachment process shall be enforced in the same manner as is now provided by law in cases where an individual is summoned as garnishee."

The plaintiff argues that Section 4608 has nothing to do with foreign attachment. He claims that it is manifest from the internal content of the Section that it relates alone to execution attachment and has nothing whatsoever to do with foreign attachment.

Section 4631 was passed March 22, 1857, and published as a part of Chapter 424, Volume 11, Delaware Laws. The pertinent language of the Section as passed is identical with the language in the Code of 1935. Prior to 1871 there was no law making a corporation liable as garnishee, and no law directing how a corporation might be summoned as garnishee. By Act passed March 23, 1871 (Chap. 90, Vol. 14) all corporations chartered by Act of the General Assembly, with certain exceptions, were made subject to the operation of the attachment laws as already provided in the case of individuals, and were made liable to be summoned as garnishees. The provisions of this Act were extended by amendments passed March 26, 1879 (Chap. 140, Vol. 16) and April 25, 1889 (Chap. 681, Vol. 18), and as amended it was published as Section 4120 of the Code of 1915. By Act approved March 20, 1919 (Chap. 226, Vol. 30), Section 4120 of the Code of 1915 was repealed, and in lieu thereof the Act which now appears as Section 4603 [*sic*] of the Code of 1935 was substituted. The only difference in language between Section 4120 of the Code of 1915 and Section 4608 of

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the Code of 1935 is that for the purpose of summoning a corporation as garnishee under 4120 in the Code of 1915 the service is upon the president, treasurer, cashier or paying clerk, while under Section 4608 in the Code of 1935, the service may also be made upon any director or the registered agent.

I am not prepared, at this time, to agree with the contention of the plaintiff that Section 4608 relates alone to execution attachments. I believe that it has been resorted to for the purpose of requiring those corporations included within its provisions, when summoned, to answer as garnishees in foreign attachment proceedings. It might also be suggested, without deciding, that under the language of the Section, some of the corporations included therein might be subject to original proceedings in domestic attachment. On the other hand, I am unable to agree with the argument of the defendant. It is the contention of the defendant that Sections 4631 and 4608 are in par materia and therefore the general language of the phrase "any corporation, aggregate or sole, not created by or existing under the laws of this State," as contained in Section 4631, must yield to the restricted language of the phrase, "All corporations doing business in this State, except banks, savings institutions and loan associations" as contained in Section 4608.

Section 4631 was passed in 1851 as a separate and distinct act purporting to deal with the matters included within its context. Section 4608 stems from a later Act, which was passed in 1871 (Chap. 90, Vol. 14). The phrase contained in the section, "All corporations doing business in this State, except banks, savings institutions and loan associations" became a part of the Section by an amendatory act in 1889 (Chap. 681, Vol. 18). Neither the Act of 1871, nor any of the subsequent amendments to it which culminated in Section 4608 specifically purport to amend, or otherwise affect, the language of Section 4631. The rule is that all consistent statutes which can stand together, though enacted at different dates, relating to the same subject, are treated prospectively and construed together as though they constituted one act. 2 Suth. Stat. Con. 443, duPont v. Mills, 9 W. W. Harr. (39 Del.) 42, 196 A. 168, 119 A.L.R. 174. The

rule is applicable only when the terms of the statute to be construed are ambiguous or its significance doubtful. 25 R.C.L. p. 1060, s. 285, duPont v. Mills, supra. The classes of corporations included within Section 4631 and the Act of 1919 (Chap. 226, Vol. 30), of which Section 4608 is a part, are clearly described in unambiguous language; furthermore, I can see no repugnancy between Section 4631 and the Act of 1919, therefore I do not believe it can be properly said that legislative intent was that the broad and comprehensive description of the corporations referred to in Section 4631 should be subject to the limitations suggested by the defendant, because of any language contained in Section 4608.

The defendant next directs attention to the fact that the legislatures of the several states have enacted statutes requiring foreign corporations doing business in a state to designate an agent upon whom process against the designatory corporation can be served, and that such statutes, even though general in terms, have been construed to authorize service only if the cause of action arises within the jurisdiction. It says that Section 4631 should be similarly construed to authorize the writ of attachment only when the cause of action arises within the State, especially when the writ is sought by a non-resident. It strongly argues that this construction is compelled by the decision of the Court of Errors and Appeals, in Natl. Bk. of W. & B. v. Furtick, 2 Marv. 35, 42 A. 479. In that case the action was begun by foreign attachment under which the plaintiff, a national corporation, having its place of business in Wilmington, in this State, attempted to garnishee a claim which the defendant had against an insurance company, a corporation of Great Britin. The defendant's claim which was the subject of the garnishee proceeding was against the insurance company for a fire loss suffered by the defendant in South Carolina, covered by a policy issued by the insurance company. The insurance company had qualified to do business in this State under the insurance law of March 24, 1879, as amended by Act passed March 17, 1881 (Chap. 347, Vol. 16), which provided:

> "That before insurance companies shall be permitted to transact business in this State, they shall file with

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the Insurance Commissioner a certificate of the name of some person, or agent, within this State, upon whom service of process may be made, and all processes against said company, issued out of the Courts of this State may then and thereafter be served upon such person or agent so designated."

The writ of attachment was issued December 15, 1894. From the return of the Sheriff, it appeared that the insurance company was summoned to answer as garnishee by serving the writ upon Ferdinand L. Gilpin, agent of the company, personally. The defendant moved to vacate the attachment. First, because of want of service upon the statutory officer, and Second, because the debt, under the facts, was not the subject of attachment in the State of Delaware. At the time of the issuance and service of the writ, there was no provision in the insurance law for the summoning of a foreign insurance company, to answer as garnishee. The only statute at that time which subjected foreign corporations doing business in this State to garnishee process was the Act of 1889 (Chap. 681, Vol. 18) which provided that "the service of the summons upon the president, treasurer, cashier, or paying clerk, as provided in attachment cases, shall be sufficient to render said officers and the corporation subject to all the liabilities provided by law." The Court held that Gilpin was not such an officer. The Court also held that the situs of the res was not in this State. For these two reasons, and also for a third reason, as contended by the defendant in the present case, the Court vacated the attachment. This third reason, as stated by the defendant, was that "since the principal defendant could not have sued the garnishee in Delaware by serving with summons a designated agent of the garnishee (due to the fact that the cause of action arose outside of Delaware, and both the principal defendant and garnishee were non-residents), the plaintiff could not properly attach the claim of the defendant against the garnishee." In referring to the provision in the insurance law (Chap. 347, Vol. 16), the Court said:

"The statute provides that before foreign insurance companies shall be permitted to do business in this State, they must appoint an agent upon whom process

> may be served. The condition has relation to the permission given. The presumption is that only such jurisdiction is claimed as is necessary to deal with litigation arising out of the business that is done under this permission."

The insurance law (Chap. 347, Vol. 16) contains thirteen sections. In its consideration of the case, it is not unreasonable to assume that the context of the entire Act indicated to the Court that it was solely designed for the benefit and protection of the holders of policies of insurance issued by the qualified insurance companies within this State and also for the protection of its citizens and residents. I am unable to see the pertinency of the Furtick case. When we consider, as I believe we must, that, in a proceeding begun by foreign attachment, the attaching plaintiff stands in no better position than a defendant's creditor who has been summoned as garnishee, in relation to the garnishee's indebtedness, I must agree with the defendant that under the provisions of the insurance law of 1881, a foreign insurance company having an agent in this State appointed under the insurance law could not be compelled to respond in a suit commenced by a non-resident by summons upon a foreign cause of action when the process was served upon the statutory agent. In arriving at its conclusion, the Court did not, nor was it necessary for it to consider any of the pertinent provisions of the Act of 1857 (4631 Code of 1935). The Court was dealing with the question of service of process upon the insurance company under the provisions of the insurance law, and not with the physical taking of property belonging to an insurance company not used in connection with its business in this State, pursuant to a writ of attachment issued under the Act of 1857, in a case in which the insurance company was named as defendant.

The defendant next argues that even if the provisions of Section 4631 were to be construed independent of those of Section 4608, there is ample authority for holding that the writ of attachment was not properly issued, and in support of this position it strongly stresses the language of the Supreme Court in Eastern Un. Co., *v.* Moffat Tunnel Imp.

Dist., 6 W. W. Harr. (36 Del.) 488, 178 A. 864, supra, where Chancellor Wolcott, speaking for the Court, said:

> "The process provided by the Statute [Section 4143, Code of 1915, now Section 4631 Code of 1935] cannot be utilized to bring before the court in this limited way an absent defendant where, if the process were that of summons personally served, the court would refuse to assert its jurisdiction over the defendant. This would seem to be self-evident."

This language is authoritative only to the extent of its application to the question then before the Supreme Court. The decision of the Court was that it would decline to assume jurisdiction in a case where for the purpose of compelling an appearance by the defendant, a foreign municipal corporation, a debt due to it was garnished. The Supreme Court, in affirming the lower Court based its opinion upon the principle of comity between the states, as it considered it would be an offense productive of a serious and aggravated nature if the practice were to prevail of one state through its courts entertaining suits against agencies of a sister state to promote and advance its own welfare. A principle based upon such a reason can have no application to the present case.

The defendant also relies to a considerable extent on the cases of Pullman P. C. Co., *v.* Harrison, 122 Ala. 149, 25 So. 697, and Hodges *v.* Pennsylvania R. Co., 171 La. 699, 132 So. 115.

In the Pullman case the action was in tort. The question, as stated by the Court, was "Can a foreign corporation's property found in this state, be attached and condemned to satisfy a demand growing out of a tort committed by it in another state?" The Court referred to the fact that without legislative enactment, a foreign corporation could not be sued outside of the state of its domicile, because there was no means by which service could be had upon it, and said "To meet and obviate this inconvenience and oftentimes injustice, the legislature of this state has enacted statutes by which process may be served upon the agents of

foreign corporations doing business in this state." As pertinent to the question before the Court, Railroad Co. *v.* Carr, 76 Ala. 388, was relied on. There it was held, after a consideration of the statutes and decisions, that a foreign corporation, though doing business in the state, through its agents located there, could not be held liable in its courts for a tort committed in another state, because in the opinion of the Court it was not the intention of the legislature, in any of the statutes, to allow a foreign corporation to be sued in Alabama, except on causes of action originating in that state, or on contracts entered into in reference to a subject matter therein.

If, as was held in the Carr case, no foreign corporation could be held liable in the Alabama Courts for any causes of action, except causes of action originating in the State, or on contracts entered into in reference to a subject matter therein, even though there was service upon the designated agent, it inevitably follows that jurisdiction could not be acquired by attachment, in the absence of express legislative authority. To meet the ruling in the Pullman case, s. 5681 of the Code of Alabama was passed, giving to the Alabama Courts jurisdiction, both in contract and in tort, of causes of action arising both against persons and corporations in other states. See Louisville & N. R. Co., *v.* Deutsche, & c. (Dist. Ct. S. D. Ala.), 43 Fed. 2d 651.

In the Hodges case the plaintiffs' action was against a non-resident corporation to recover damages for a tort committed outside of the State. The action was grounded on Act 215 of 1920, authorizing writs of attachment in suits against non-resident corporations for damages arising from offenses, quasi offenses and tort. The Court held that this Act must be construed in connection with the provisions of Act 184 of 1924, limiting the jurisdiction of the State Courts over non-resident corporations having an agent or doing business within the State to cases of liability growing out of or connected with the business done by the corporation in the State. The Court's opinion was based upon the reasoning that since the laws of the State did not permit a suit of the character under review to be brought against a non-resident corporation admitted to do business and owning property within the State, it would be illogical to hold that

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they do permit such a suit to be brought against a non-resident corporation not admitted to do business within the State, merely because it temporarily had some property in the State. This case is not helpful, as the Court's reasoning is directly contrary to the decision of this Court in Albright *v.* United States Products Company, 5 Penn 198, A. , where it was held that a foreign corporation was subject to foreign attachment process notwithstanding that it had complied with our law relating to foreign corporations and had appointed an agent upon whom process could be served.

The language of Section 4631 is plain and unambiguous. There is nothing in the context to signify that its provisions are to be given any limited or special meaning. Its provisions are broad and sweeping. Under its provisions there are four requisites for jurisdiction, (1) a plaintiff, (2) a cause of action, (3) a res, and (4) a defendant.

In this case the plaintiff is not a citizen of this State. Under the facts in the case, the defendant apparently questions the availability of the process to the plaintiff because of that fact. The parties are not in accord as to whether a state can constitutionally deny a plaintiff the use of its courts on the ground that the plaintiff is not a citizen of the State. The plaintiff relies, among others, on the two Delaware cases of Swift *v.* Richardson, 7 Houst. 338, in our former Court of Errors and Appeals, and Johnstone *v.* Kelly, 7 Penn. 119, before Judge Spruance, sitting for the purpose of investigating the allegations in an affidavit filed by the defendant, on which, at the suit of a citizen of another state, a writ of attachment was issued by a Justice of the Peace. It was held in both cases that a state statute denying to a citizen of another state a remedy given to a citizen of this State, would be void under s. 2, Art. IV of the Constitution of the United States. On the other hand, the defendant says that the privileges and immunities clause of the Constitution does not require a state to open its courts to residents and non-residents alike upon foreign causes of action, in support of which it cites a number of Federal cases, including Douglas *v.* New Haven R. Co., 279 U. S. 377, from which it quotes the language of Mr. Justice Holmes that "There are manifest reasons for preferring residents in access to often overcrowded Court, both in con-

venience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned." I do not believe, however, that the particular constitutional provision has any direct application to the question in this case. It is inconceivable to believe that the right of a citizen of a foreign state to proceed under Section 4631 against a foreign corporation is not identical with his right to proceed under Section 4630 of the 1935 Code (4142 Code of 1915) against a non-resident individual. Section 4630 reads, in part, as follows:

> "A writ of foreign attachment may be issued against any person not an inhabitant of the State * * * upon affidavit made by the plaintiff, or some other creditable person, and filed with the Prothonotary, that the defendant resides out of the State, and is justly indebted to the said plaintiff in the sum exceeding fifty dollars. * * *."

In Ownbey *v.* Morgan, 256 U. S. 94, 41 S. Ct. 433, 65 L. Ed. 837, 17 A. L. R. 873, supra, the question of the constitutionality of this Section was before the Supreme Court of the United States upon a writ of error to the Supreme Court of this State which brought before the Supreme Court of the United States for review a judgment entered by this Superior Court in a foreign attachment proceeding brought by a citizen of another state, upon a transitory cause of action in contract, in which shares of stock in a Delaware corporation were attached. In its opinion the Supreme Court of the United States said:

> "In Pennoyer *v.* Neff, 95 U. S. 714, 722-724, it was shown that the process of foreign attachment has its fundamental basis in the exclusive jurisdiction and sovereignty of each State over persons and property within its borders; and although emphasis was there laid upon the authority and duty of a State to protect its own citizens in their claims against non-resident owners of property situate within the State, it is clear that, by virtue of the 'privileges and immunities' clause of s. 2 of Art. IV of the Constitution, each State is at liberty, if not under a duty, to accord the same privi-

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> lege and protection to creditors who are citizens of other States that it accords to its own citizens. Blake *v.* McClung, 172 U. S. 239, 248, et seq."

In the Ownbey case, the Supreme Court of the United States clearly indicated, in its opinion, that the language of Section 4630 accorded the same privileges and protection to creditors who are citizens of other states that it accorded to our own citizens. In accord with this view, a comparison of the language of Section 4630 with that of Section 4631 would compel the conclusion that our courts are likewise open to citizens of foreign states under Section 4631. I think I can safely say that in every instance where the right has been given by statute of this State in unrestricted language, as is the case in Section 4631, to institute proceedings in our law courts, it has been the universal view of both the bench and bar, for many years, that the citizens of this and other states were entitled to that right without discrimination, except as to security for costs by non-residents. A construction of statutes that have been so reviewed for many years should not be disregarded.

The form of the plaintiffs' action and the character of the res present no difficulty. The action is in covenant. It is a transitory action which belongs to the class of actions of which this Court has cognizance, consequently there can be no question as to the right of the plaintiff, by reason of the form of action, to proceed by foreign attachment, because as was held by the Supreme Court in construing Section 4631, under its provisions "there now exists no policy which mitigates against utilizing foreign attachment process in all contract actions." Blaustein *v.* Standard Oil Co., Terry (Del.), 49 A. 2d 726, supra. The shares of stock taken under the attachment are in a Delaware corporation. Under Section 92 (2124 Code of 1935) of the General Corporation Law of this State, shares of stock in a Delaware corporation are placed in the category of property that is attachable, and, by Section 72 (2105 Code of 1935) thereof, the situs of such shares of stock is in this State for the purpose stated in Section 92.

The primary contention of the defendant is that Section 4631, standing alone, is not sufficiently explicit in its terms

to overcome the presumption that the process authorized against foreign corporations is confined to litigation arising out of business done in this State, and that the Section is therefore wholly inadequate to encompass the proceedings at bar.

"The purpose of the process of foreign attachment is to acquire jurisdiction of a defendant who does not reside within the jurisdiction of the court, by taking his property within the jurisdiction and thereby compelling his appearance to the suit of his creditor." Woolley on Del. Pr. s. 1270. "The absence of a resident from the jurisdiction, or the presence of a non-resident within the jurisdiction, does not affect or control the application of the principle governing the process of foreign attachment • • •. The characteristic of non-residence in the process of foreign attachment applies to corporations as well as to individuals." Woolley on Del. Pr. s. 1274.

The only reported case in which our Courts have read an exception into the phrase, "a corporation not created by or existing under the laws of this State," contained in Section 4631, is Eastern Un. Co. *v.* Moffat Tunnel Imp. Dist., 6 W. W. Harr. (36 Del.) 488, 178 A. 864 (affirmed at 495 et seq.), supra, where this Court said, "The law seems to be quite well settled that a municipal corporation is liable to suit only in the State of its creation." This being so, it necessarily follows that a municipal corporation would neither be amenable to process or have the capacity to stand in judgment in a foreign jurisdiction. Because of this it is evident that it would be beyond the power of a creditor, whether a citizen of this or another state, to properly bring a suit in this State by foreign attachment under Section 4631, against a foreign municipal corporation, upon a cause of action arising either within or without the State. Even in the event of such a suit, being coerced by reason of the attachment of its property, the municipal corporation appeared, the probable resulting consequence would be the quashing of the process and the dissolution of the attachment. But it is otherwise with respect to the defendant in this case. It has the capacity to be sued in any state, and it and its property is amenable to all legal process, wherever issued, against it, when legal service is had.

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The jurisdiction of the Delaware Courts is co-extensive with its sovereignty, and that embraces the persons and things within its territorial limits. The question in this case in no way involves the jurisdiction of this Court to enter a judgment in personam against the defendant corporation. It cannot be compelled to respond to the process issued in the case. The judgment under attack is a judgment nisi in rem, in which the judgment can only bind the property seized under the writ. Ownbey *v.* Morgan, 256 U. S. 94, 41 S. Ct. 433, 65 L. Ed. 837, 17 L. R. A. 873. It is unquestionably true that the property of a citizen or resident of a foreign state, within the limits of Delaware, is subject to the exclusive jurisdiction of our courts, and this is fundamentally the basis for a proceeding in foreign attachment. McLaughlin *v.* Bahre, 5 W. W. Harr (35 Del.) 446, A. ; Ownbey *v.* Morgan, supra; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 365; Dorr *v.* Gibboney, et al., 7 Fed. Cas. 923, Case No. 4,006. The thing belonging to the absent defendant is seized and applied to the satisfaction of his obligation. The Federal Constitution presents no obstacle to the full exercise of this power. The only essentials to the exercise of the State's power are presence of the res within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard. Pennington *v.* Fourth Natl. Bk., 243 U. S. 269, 37 S. Ct. 282, 61 L. Ed. 713, L. R. A. 1917 F 1159; McLaughlin *v.* Bahre, supra.

My conclusion is that Section 4631 authorized the issuance of the writ of foreign attachment in this case under the facts of the case.

The next point presented by the defendant is that if Section 4631 should be construed to authorize the attachment here made, it unreasonably obstructs and unduly burdens interstate commerce, and is to that extent void by virtue of violating the Interstate Commerce Clause of Article 1, Section 8 of the United States Constitution.

The commerce clause (Art. I, Sec. 8) of the United States Constitution provides:

> "The Congress shall have Power • • • to regulate Commerce with foreign Nations, and among the several States."

The defendant calls attention to the fact that by virtue of this delegation of authority to the Federal Government, it has been held under a variety of circumstances that the several states may not, by direct regulation, taxation, or otherwise, unduly obstruct or burden commerce among the several states, for which it cites Western Union Tel. Co. *v.* Kansas, 216 U. S. 1; International Textbook Co. *v.* Pigg, 217 U. S. 91, 111; Buck Stove Co. *v.* Vickers, 226 U. S. 205, 216; Adams Mfg. Co., *v.* Storen, 304 U. S. 307; Best & Co. *v.* Maxwell, 311 U. S. 454.

It says that this principle has been applied specifically to efforts by states to exercise jurisdiction over the trial of causes of action arising in other states against foreign corporations engaged directly in interstate commerce. It refers to the cases of Davis *v.* Farmers Co-op. Co., 262 U. S. 312, 43 S. Ct. 556; Atchison Ry. Co. *v.* Wells, 265 U. S. 101; Michigan Cent., *v.* Mix, 278 U. S. 492, and Denver & R. G. W. R. Co., *v.* Ferte, 284 U. S. 284. It says that in each of those cases the Supreme Court of the United States held that a state might not exercise jurisdiction to try claims of a non-resident against a foreign corporation engaged in the business of interstate transportation where the cause of action did not arise within the state seeking to exercise the jurisdiction.

In the Davis case the original action was brought in Minnesota by Farmers Co-operative Company, a Kansas corporation, against James C. Davis, Director General of Railroads, as agent for the Atchison, Topeka & Santa Fe Railway Company, another Kansas corporation engaged in interstate transportation for hire. The Railway Company had an agent for the solicitation of freight and passenger traffic in Minnesota, and service of process was made upon the agent, pursuant to a Minnesota statute which provided:

> "Any foreign corporation having an agent in this state for the solicitation of freight and passenger traffic or either thereof over its lines outside of this state, may be served with summons by delivering a copy thereof to such agent."

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Whether this statute, as construed and applied, violates the Federal Constitution, was the only question for decision. In the action recovery of damages was sought for loss of grain shipped under a bill of lading issued by the Railway Company, for transportation over its lines between points in Kansas. A motion was made to dismiss the action on the ground that it violated the equal protection clauses of the Fourteenth Amendment, as well as the commerce clause in the Federal Constitution. The motion to dismiss was denied. Upon writ of error to the Supreme Court of the United States, the order of dismissal was reversed. In its opinion the Supreme Court considered the fact that claims against interstate carriers for personal injuries and for loss and damage of freight are numerous; that the amounts demanded are large; that in many cases carriers deem it imperative, or advisable, to leave the determination of their liability to the courts, that litigation in states and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations, and that this impairs efficiency in operation, and causes, directly and indirectly, heavy expenses to the carriers, and that these are matters of common knowledge. The defendant quotes from the opinion of the Supreme Court in holding the Minnesota statute unconstitutional, the following:

> "The fact that the business carried on by a corporation is entirely interstate in character does not render the corporation immune from the ordinary process of the courts of a State. * * * It may be that a statute like that here assailed would be valid although applied to suits in which the cause of action arose elsewhere, if the transaction out of which it arose had been entered upon within the State, or if the plaintiff was, when it arose, a resident of the State. These questions are not before us; and we express no opinion upon them. But orderly, effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in a State in which the cause of action did not arise, in which the transaction giving

> rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside. The public and the carrier are alike interested in maintaining adequate, uninterrupted transportation service at reasonable cost. * * * Avoidance of waste, in interstate transportation, as well as maintenance of service, has become a direct concern of the public. With these ends the Minnesota statute, as here applied, unduly interferes. By requiring from interstate carriers general submission to suit, it unreasonably obstructs, and unduly burdens, interstate commerce."

In the Wells, Terte and Mix cases the Courts recognized and applied the principle laid down in the Davis case. Each case involved situations in which the defendant corporation was an interstate carrier for hire.

The defendant also refers to and quotes from articles by authors appearing in 27 Columbia L. Rev. 12 and 33 Illinois L. Rev. 875-882. In the article in the Columbia Law Review the writer expresses the opinion that interstate railroads are no more harassed by such suits, as in the Davis case, than interstate insurance companies, interstate mercantile firms, or companies doing any other kind of business in several states, and he says that Justice Brandeis' argument in the Davis case would apply equally well to any other interstate commercial enterprise. A similar view was expressed by the author in the article in the Illinois Law Review. These articles merely express the views of the writers. My attention has not been directed to any Federal or other cases in which any similar view was expressed.

The language of Professor Beale, in his treatise on Conflict of Laws, to which the defendant directs attention, that

> "A state statute providing for service of process upon an agent of a foreign corporation doing business in the state, so far as it applies to a corporation engaged in interstate commerce, and to a cause of action not connected with the business carried on

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> within the state is unconstitutional as involving an interference with interstate commerce,"

as an authority, goes no farther than the supporting cases, which are Davis *v.* Farmers Co-op. Co., 262 U. S. 312, 53 S. Ct. 556, supra, and Sioux Remedy Co. *v.* Cope, 235 U. S. 197, 35 S. Ct. 57. In the Davis case, as already stated, the foreign corporation was engaged in the business of interstate transportation for hire. The Cope case, and also the cited cases of Dahnke-Walker M. Co., *v.* Bondurant, 257 U. S. 282, and Furst *v.* Brewster, 282 U. S. 493, involved actions to recover for goods sold and shipped in interstate commerce, in which the defendants sought to avoid liability by showing non-compliance with the state statutes which conditioned the right of the foreign corporations to sue in such case upon its registration under the state statute. In this case it appears that the defendant's transportation business is directly connected with its own operations. It is nowhere shown that any of its activities include those of a public carrier for hire. Upon this showing it seeks to have the principle applied to the case which underlies the decision in the Davis case. This principle is that "The public and the carriers are alike interested in maintaining adequate, uninterrupted transportation services at reasonable cost." In the Davis case the Court said "This common interest is emphasized by Transportation Act, 1920, which authorizes rate increases necessary to insure to carriers efficiently operated a fair return on property devoted to public use." The defendant, in seeking the application of the principle to this case, strongly stresses its large interstate business throughout the mid-west, and contends that the present litigation would be particularly burdensome to it, as well as to the Courts and taxpayers of this State. I can conceive of no good reason why the extent of the business of a defendant, or the burden on the courts or the state, should be decisive on a question of jurisdiction. My attention has not been directed to any case in point on facts analogous to those in the present case. This is a strong indication to me that the extent and effect of the principle is limited to interstate

carriers for hire, and I believe it is so limited, and for that reason it will not be applied in this case.

The last point presented is that if 4631 should be construed to authorize the attachment here made, it deprives defendant of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

In its reply brief the defendant has restated briefly its position on its point.

It states first, that to require a foreign corporation which does no business in the state to defend a foreign cause of action "away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process" and for this it cites Internat. Shoe Co. v. Washington, 326 U. S. 310, 317, and Riverside Mills v. Menefee, 237 U. S. 189, 194-5, each of which was begun by summons. It should be noticed that in the Menefee case the corporation had no property in the foreign state.

For authority in support of this proposition it is not necessary to go outside of our own State. In Atlas Mut. Ben. Assn., v. Portscheller, Terry (Del.) , 46 A. 2d 643, the Supreme Court held that a foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business in such manner and to such extent as to warrant the inference that it is present there, and said there must be some continuity of business activity on the part of the corporation in the state of the forum, "enough to demand a trial away from its home."

It states next, that the implied consent of a corporation to be sued by reason of doing business within a state without the appointment of a statutory agent, permits the corporation to be sued only upon causes of action arising in the forum, and it cites Simon v. Southern Ry., 236 U. S. 115. In this case the Court recognized the right of every state to provide for service of process upon any foreign corporation doing business therein; to require such companies to name agents upon whom service can be made, and to provide that in case of the company's failure to appoint such

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agent, service, in proper cases, may be made upon *an officer designated by law*, but as stated by the Court, this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the state enacting the law. In this case the principle laid down in Old Wayne Life Asso., v. McDonough, 204 U. S. 8, that the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states, was followed.

With the above two statements as a premise, the defendant states finally that the implied consent to be sued evidenced by ownership of shares of stock in a Delaware corporation is no greater than the implied consent to be sued resulting from doing business in a state without qualifying therein, and accordingly, the process of foreign attachment cannot be used against a non-qualified foreign corporation in order to institute an action upon a foreign cause of action.

If it is to be inferred that a consent to be sued is to be implied by reason of the mere ownership of stock in a Delaware corporation, that inference can only be based upon the presumption that property in this State belonging to absent owners is in the care and management of persons who represent the absentee, who will communicate with the owners information about any proceedings taken in relation to the property. As stated above, the fundamental basis of foreign attachment is the *exclusive* jurisdiction and sovereignty of each state over the persons and property within its borders. McLaughlin v. Bahre, 5 W. W. Harr. (35 Del.) 446. I can see no analogy between an implied consent to be sued in personam resulting from doing business in a state without qualifying, and a proceeding quasi in rem where the res is within the exclusive jurisdiction of the state. In Ownbey v. Morgan, 226 U. S. 94, 41 S. Ct. 433, 65 L. Ed. 837, 17 A. L. R. 873, supra, it was said:

> "The courts of Delaware at all times have laid emphasis upon the difference between the original char-

> acter of a suit by foreign attachment, treating it as an *ex parte* proceeding *quasi in rem*, looking to a judgment of condemnation against the property attached and having the incidental object of compelling defendant's appearance—on the one hand—and the action in *personam*, with its appropriate incidents, • • •—on the other,"

and with respect to due process in foreign attachment proceedings, it said:

> "The due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall. It restrains state action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard where liberty or property is at stake in judicial proceedings. But a property owner who absents himself from the territorial jurisdiction of a State, leaving his property within it, must be deemed *ex necessitate* to consent that the State may subject such property to judicial process to answer demands made against him in his absence, according to any practicable method that reasonably may be adopted. A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the States as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law, • • •"

One of the questions before the court was the constitutionality of Section 4142 of the Code of 1915 (4630 Code of 1935). The Court's conclusion was that "the statutes under consideration were not in conflict with the due process provision of the Fourteenth Amendment."

The pertinent part of Section 4630 is hereinabove set out. It authorizes the issuance of a writ of foreign attachment against "any person not an inhabitant of the State."

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Section 4631, under which the writ in this case was issued, authorizes the issuance of a writ against "any corporation, not created by or existing under the laws of this State." In other respects the pertinent language of the Sections is so nearly identical that I must hold that the decision in the Ownbey case is binding on this Court on the question of the process, as I consider the factual situation in the Ownbey and the instant case substantially the same. In each of the cases the plaintiff was a citizen of a foreign State, and the property seized under the writ was shares of stock in a Delaware corporation. In one case the defendant was a non-resident, and in the other it was a foreign corporation. In each case the cause of action was in contract, a foreign cause in this case, whether this is so in the Ownbey case does not specifically appear, but in each case the cause of action was a transitory cause, and as such within the general jurisdiction of the Superior Court.

That which has been herein stated applies to the above entitled case. It is also applicable to two other cases against the same defendant, being Nos. 137 and 138, May Term, 1945. The plaintiffs in No. 137 being Jacob Blaustein, Henrietta Blaustein, Fanny B. Thalheimer and Ruth B. Rosenberg, Executors of Louis Blaustein, deceased, who are not residents of Delaware, and who are the Executors of a person, who at the time of his death, was not a resident of Delaware, and the plaintiff in No. 138 being American Trading and Production Corporation, which is a Maryland corporation.

I am of the opinion that the motion of the defendant in each of the three cases to vacate the judgments nisi entered therein, and to dismiss the attachment proceedings therein, should be denied.

Appropriate orders will be signed in accordance with this opinion.

EXHIBIT B

Standard Oil Company, a corporation of the State of Indiana, Petitioner, v. The Superior Court of the State of

Delaware in and for New Castle County and the Honorable Frank L. Speakman, sitting as Judge of said Court, Respondents. (Three cases)

Standard Oil Company, a corporation of the State of Indiana, Petitioner, v. The Superior Court of the State of Delaware in and for New Castle County and the Honorable Frank L. Speakman, sitting as Judge of said Court, and Jacob Blaustein, Respondents.

Standard Oil Company, a corporation of the State of Indiana, Petitioner, v. The Superior Court of the State of Delaware in and for New Castle County and the Honorable Frank L. Speakman, sitting as Judge of said Court, and Jacob Blaustein, Henrietta Blaustein, Fanny B. Thalheimer and Ruth B. Rosenberg, Executors of Louis Blaustein, deceased, Respondents.

Standard Oil Company, a corporation of the State of Indiana, Petitioner, v. The Superior Court of the State of Delaware in and for New Castle County and the Honorable Frank L. Speakman, sitting as Judge of said Court, and American Trading and Production Corporation, a corporation of the State of Maryland, Respondents.

(November 1, 1948)

Supreme Court of Delaware.

Harrington, Ch., Terry, Carey and Pearson, JJ., sitting.

Six petitions for writs of prohibition and motions by respondents to dismiss them.

The petitioner in each petition is the defendant in three actions commenced by foreign attachment in the Superior Court, New Castle County. Under special appearance, the petitioner moved to quash the attachment writs in each case. Ultimately, after writs of error to this Court, the motions were denied and judgments *nisi* for want of an appearance were entered against petitioner. *Blaustein* v. *Standard Oil Co.*, — Terry —, 49 *A.* 2d 726; 51 *A.* 2d 568. Upon subsequent applications of petitioner, the Superior Court granted it leave, again under special appearance, to contest the jurisdiction of that Court in the three actions. *Blaustein*

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v. Standard Oil Co. of Indiana, — Terry —, 54 *A.* 2d 596. After hearing petitioner's motions to vacate the judgments *nisi* and to dismiss the attachments, the Superior Court denied the motions. *Blaustein v. Standard Oil Co. of Indiana*, — Terry —, 56 *A.* 2d 772. Petitioner, still appearing specially, then filed the present six petitions for writs of prohibition: with respect to each of the Superior Court actions there are two petitions, one joining the "Superior Court" and the Honorable Frank L. Speakman as Judge of that Court, as respondents; and the other joining the "Superior Court," Judge Speakman and the plaintiffs in the law action to which it relates. Petitioner asks this Court to prohibit further proceedings in the three law actions on the ground that the Superior Court is acting in excess of its jurisdiction in entertaining them. Respondent's motions to dismiss the petitions controvert this ground.

Hugh M. Morris, Edwin D. Steel, Jr. and S. Samuel Arsht, of Wilmington, and Ralph S. Harris, John R. McCullough and Frederick W. P. Lorenzen, of New York, New York, for petitioner.

Clarence A. Southerland, Caleb S. Layton and Aaron Finger, of Wilmington, Nathan L. Miller, of New York, New York, and Karl F. Steinmann, of Baltimore, Maryland, for respondents.

Pearson, J., delivering the opinion of the Court:

In these prohibition cases, petitioner challenges the jurisdiction of the Superior Court in three actions against it. The actions were begun by attachments of petitioner's property purportedly made under authority of a foreign corporation attachment statute, *Rev. Code of Del.*, 1935, § 4631. Petitioner contends that the statute, properly construed, does not authorize proceedings under it in these actions; but that if it were construed to be applicable to them, it would violate the commerce clause (Art. I, Sec. 8) of the Federal Constitution by imposing an undue burden upon interstate commerce conducted by petitioner, and would violate the due process clause (Fourteenth Amendment) by depriving petitioner of its property without due process of law. The Superior Court considered these contentions and determined them adversely to petitioner.

The statute, insofar as we need consider it, provides as follows:

> "4631. Sec. 26. Foreign Corporation; Subject to Foreign Attachment Laws; How Writ Obtained; Affidavit; Purport of; Writ; How Framed, Directed, Executed and Returned; Attachments Dissolved How; Judgment, When Obtained; Security for Dissolution of Attachment; Form and Amount of How Determined;—A writ of foreign attachment may be issued out of the Superior Court of this State against any corporation, aggregate or sole, not created by or existing under the laws of this State, upon affidavit made by the plaintiff or any other credible person, and filed with the Prothonotary of said Court, that the defendant is a corporation not created by, or existing under the laws of this State, and is justly indebted to the said plaintiff in a sum of money, to be specified in said affidavit, and which shall exceed fifty dollars.
>
> "The said writ shall be framed, directed, executed and returned, and like proceedings had as in the case of a foreign attachment issued under the next foregoing section, except that attachments to be issued under this section shall be dissolved only in the manner hereinafter provided. * * *"

Petitioner's first point is that the statute "does not authorize a writ of foreign attachment upon a foreign cause of action at the behest of a foreign plaintiff against a foreign corporation." None of the plaintiffs in the law actions is a resident of Delaware or a Delaware corporation. The defendant (petitioner here) is an Indiana corporation. It owns no tangible property in Delaware, but owns shares of stock in a Delaware corporation which were attached in the actions. It is not qualified to do business in Delaware and does no business here. Its principal executive offices are in Chicago, and it transacts business in some fifteen midwestern states. It has no officers, directors, employees, or agents in Delaware. Its directors have never met in Delaware. The alleged causes of action against the petitioner are in covenant and are based upon breaches of an instru-

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ment executed outside of Delaware. No undertaking or covenant alleged to have been breached requires the doing of any act in Delaware.

Petitioner observes that the terms of the statute authorizing the process of foreign attachment are general; "it does not state by whom that process may be availed; for what causes of action it may be utilized or against what foreign corporations it may issue." Nevertheless, it is argued, a construction of the statute with reference to other rules of law excludes from its ambit the writs issued in these actions. Strong reliance is placed on the case of *Nat Bank of W. & B. v. Furtick*, 2 *Marvel* 35, 43 *A.* 479. That case was begun by foreign attachment. The plaintiff attempted to attach a credit of the defendant in the hands of an insurance company incorporated under the laws of Great Britain by summoning it as garnishee. The insurance company had qualified to do business in Delaware, and service was made upon its agent in Delaware designated pursuant to the insurance statutes. The defendant's claim against the insurance company was for a fire loss in South Carolina. A motion to vacate the attachment was granted. For present purposes, the case may be considered as though it were an action in Delaware by the defendant (a nonresident) against the garnishee (foreign) insurance company, based on the fire loss in South Carolina, a summons having been served on an agent designated by the insurance company. The Court assigned three grounds for its decision. With the first and second, we are not concerned. The third ground was that, notwithstanding general language of the designation by the insurance company of a "person or agent within this State, upon whom service of process may be made", and the statutory provision that "all process against such company issued out of the courts of this State, may then and thereafter be served upon such person or agent so designated", the insurance statute should be construed as inapplicable to an action by a nonresident, not arising out of business done in Delaware. In the opinion, the court said:

> "The statute provides that before foreign insurance companies shall be permitted to do business in this

State, they must appoint an agent upon whom process may be served. The condition has relation to the permission given. The presumption is that only such jurisdiction is claimed as is necessary to deal with litigation arising out of the business that is done under this permission. 'Statutes by which the jurisdiction is assumed should be construed strictly, and should not, unless their language is explicit, be held to confer jurisdiction beyond that which is required to enable the Courts to take cognizance of matters arising out of the business done within the State, or else to protect and enforce the rights of the residents of their own State against foreign corporations.'

"Judge Wheeler in a case decided in Vermont in 1874 (*Sawyer v. North American Life Ins. Co.*, 46 Vt. 697), expressed very strongly the opinion that a statute providing for the appointment of an agent on whom a process might be served, ought not to be construed as intended to permit a non-resident to sue a foreign corporation for a cause of action arising outside of the State. He said that even assuming that the agent in that case had been appointed in obedience to the statute, the question still remained, what cases the statute was intended to reach. A statute is to be construed with reference to the old law, the mischief and the remedy. When this statute was passed the old law permitted the agents of any insurance company, foreign as well as domestic, to make contracts of insurance within the State under which causes of action would accrue to our own people within the jurisdiction of the State Courts. The mischief was that the jurisdiction of the State Courts over these causes of action would be unavailing except upon voluntary appearance, for want of power in the Courts to compel appearance. The remedy provided was the requiring of any foreign insurance company making such contract to keep an agent in this State on whom service could be made.

"This would be a full remedy for all that mischief without requiring such companies to keep an agent here on whom any process for any purpose could be served.

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> There could be no advantage obtained for the people of the State by providing means to give the Courts of the State jurisdiction over causes of action that occurred out of the State in favor of persons not citizens of the State against a corporation existing out of the State; and it is not to be presumed that the Legislature intended to accomplish that purpose unless that is the necessary result of the enactment. It is more reasonable to suppose that the intention was to provide a method for obtaining jurisdiction over a defendant to a cause of action the Courts had jurisdiction of before, than that it was to provide means for obtaining jurisdiction of a course [sic] of action where none was had before, and of the parties also by the compulsory appointment of an agent. 12 Harvard Law Rev. Vol. 1.
>
> "The statute is not so explicit as to be clearly intended to require a foreign insurance company to submit to suits in this State, having no relation to the business done within the State nor with one of her citizens, or to suits brought by persons that are citizens of the State where the corporation was organized or of some other foreign State. For this reason the attachment would have to be dismissed in this case."

Petitioner argues that in so deciding, the Court laid down a rule of general application; and that the reasons for the rule are of general application and "have convinced the Supreme Court of the United States and many other courts to reach similar results in a variety of cases", citing *Morris & Co. v. Ins. Co.*, 279 *U. S.* 405; *Mitchell Furn. Co. v. Selden Breck Co.*, 257 *U. S.* 213, among others. Continuing, petitioner says that the reasons and the rule of the *Furtick* case apply to actions against foreign corporations whether the process employed is foreign attachment or summons, their purpose being the same, namely, to compel the appearance of the defendant. Petitioner cites *Pullman Palace Car Co. v. Harrison*, 122 *Ala.* 149, 25 *S.* 697; *W. H. Hodges & Co. v. Pennsylvania R. Co.*, 171 *La.* 699, 132 *S.* 115; *French v. Artistic Furn. Co.*, 173 *La.* 982, 139 *S.* 307 in support of its contention that a defendant should not "be made liable

upon a cause of action by suit in attachment, when it would not be liable in the same court, upon the same cause of action by suit commenced by summons and complaint upon personal service, because of the want of jurisdiction in the court to hear and determine the cause" (25 *S.* 700). Petitioner also refers to *Ea. Un. Co. v. Moffat Tnl. Imp. Dist.*, 6 *W. W. Harr*, 488, 178 *A.* 864 as recognizing such a principle, and particularly the following quotation from that case:

> "The purpose of the foreign attachment statute is solely to supply a means of process to secure the limited presence before the court of a non-resident defendant through seizure of his property located here, and to the extent of the value of the seized property to subject the non-resident to a possible satisfaction of the plaintiff's demand. The process provided by the statute cannot be utilized to bring before the court in this limited way an absent defendant where, if the process were that of a summons personally served, the court would refuse to assert its jurisdiction over the defendant. This would seem to be self-evident. The fact, therefore, that the foreign attachment statute (*Revised Code* 1915, §4143) in general terms provides that the writ may issue against 'any corporation, aggregate or sole, not created by or under the laws of this State,' cannot have the effect of subjecting a foreign corporation to proceedings under the statute if, on general principles, the court would not entertain jurisdiction over it."

Despite the logic of petitioner's argument as stated, we think there are additional considerations than those dealt with, which must be taken into account. Our primary task at this point is to construe Section 4631 with particular reference to whether the foreign attachment process is available in actions by non-resident plaintiffs for causes arising outside of Delaware. As petitioner freely concedes, the terms of the act in these respects are general and sufficient to embrace non-resident plaintiffs and foreign causes. Whether the general language should be construed as limited, as petitioner urges, depends on considerations apart from anything contained in the act.

The language with which we are concerned is substantially the same as the first two sections of its earliest forerunner, adopted in 1857, 11 *Laws of Del.* p. 482. As we pointed out in another opinion in this litigation (49 *A.* 2d 726), the 1857 Act was adopted shortly after the Superior Court had held that the 1852 *Code* provisions [12] for foreign attachment were not applicable to foreign corporations but only to individual defendants. We also pointed out that "The 1857 Act is closely related to the 1852 *Code* provisions by express reference, and in its history, purpose and content." Now, we think it irrefragable that these provisions of the 1852 *Code* (which now remain substantially unchanged as Section 4630 of the 1935 *Code*) authorize foreign attachment writs in actions against non-resident individual defendants brought by non-resident plaintiffs on "foreign" causes of action. Compare: *Ownbey v. Morgan*, 256 *U. S.* 94, 41 *S. Ct.* 433, 65 *L. Ed.* 837, 17 *A. L. R.* 873; *Johnstone v. Kelly*, 7 Penne. 119, 74 *A.* 1099. The similarity in phraseology of the 1852 *Code* and the 1857 Act, together with the history of the latter, furnish persuasive reasons for construing the 1857 Act as applicable in like situations so far as the residence of the plaintiff and the place where the cause of action accrues are concerned.

Moreover, differences between a corporation and an individual do not suggest any reason for treating them differently with respect to jurisdiction in *quasi in rem* proceedings, such as are authorized by this statute. The basic jurisdictional doctrine involved is the same whether the property seized be owned by a foreign corporation or by a non-resident individual: that a state may, by appropriate legislation, authorize the seizure and disposal of property

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[12] The 1852 *Code* provisions referred to read thus (Chap. 104, Sec. 19, p. 374):

"A writ of foreign attachment may be issued against any person not an inhabitant of this State, after a return to a summons, or capias, issued and delivered to the sheriff, or coroner, ten days before the return thereof, showing that the defendant cannot be found, and proof, satisfactory to the court, of the cause of action; or upon affidavit made by the plaintiff, or some other credible person, and filed with the prothonotary, that the defendant resides out of the State, and is justly indebted to the said plaintiff in a sum exceeding fifty dollars."

within its borders, subject to limitations of the federal and state constitutions. *McLaughlin v. Bahre,* 5 *W. W. Harr.* 446, 166 *A.* 800.

Petitioner says that these considerations are outweighed by the rule and the reasons of the *Furtick* case. That rule and those reasons relate to the subject of jurisdiction in a proceeding *in personam.* A review of the development of doctrines of jurisdiction *in personam* over a corporation bears this out. The doctrines grow up *after* actions *quasi in rem* against foreign corporations had been recognized. In *The Position of Foreign Corporations in American Constitutional Law,* by Gerard Carl Henderson (Harvard Studies in Jurisprudence, Vol. II) Chap. 5, pp. 77, 78, we find:

> "As foreign corporations became an increasingly important factor in the business communities of the several states, and their legal status to be generally recognized and accepted, the question inevitably arose whether they could be subjected to suit within the state. Until toward the middle of the century, the idea seems to have been widely prevalent that foreign attachment was the only process available against them. • • •
>
> "There was, of course, no doubt that foreign attachment against corporations of other states could be expressly authorized by statute. Rhode Island made such a provision in 1822, New York in 1829, Maryland in 1832, Pennsylvania in 1836, New Jersey and Massachusetts in 1839. By 1850, Missouri, Michigan, Maine and Wisconsin had followed suit. In the meantime the Supreme Court of Pennsylvania in an exhaustive opinion had declined to follow the lead of New York, and had construed its general foreign attachment statutes as applicable to foreign corporations. Until the middle of the century, this seems to have been the normal way of proceeding against corporations of other states."

In *St. Clair v. Cox,* 106 *U. S.* 350, 354 (1882), Mr. Justice Field said:

> "Formerly it was held that a foreign corporation could not be sued in an action for the recovery of a per-

sonal demand outside of the State by which it was chartered. The principle that a corporation must dwell in the place of its creation, and cannot, as said by Mr. Chief Justice Taney, migrate to another sovereignty, coupled with the doctrine that an officer of the corporation does not carry his functions with him when he leaves his State, prevented the maintenance of personal actions against it. There was no mode of compelling its appearance in the foreign jurisdiction. Legal proceedings there against it were, therefore, necessarily confined to the disposition of such property belonging to it as could be there found; and to authorize them legislation was necessary."

See also *Goodrich on Conflict of Laws*, p. 147.

Jurisdictional doctrines relating to actions *in personam* developed separately from those relating to actions *quasi in rem*. That development was profoundly influenced by the non-migratory principle mentioned by Mr. Justice Field in the quotation above. (Obviously, no such principle applied in the case of *in personam* actions against non-resident *individuals*, since their capacity to be physically present in a state was recognized and such presence made them subject to personal service of process.) At least two legal theories developed to support the subjection of foreign corporations to actions *in personam*. We quote the following discussion from *Goodrich on Conflict of Laws*, pp. 147-151:

"Such a doctrine [the non-migratory principle] of necessity could not remain as the last word on the subject in an era of ever-increasing development of corporate activity. Some theory had to be worked out by which the foreign corporations could be subjected to suit in states other than where they were organized. This theory was found in the consent doctrine. The corporation, like the individual, could consent to suit in a place at which it was not personally present. Furthermore, the state could refuse to allow a foreign corporation to do business within its borders, subject to certain exceptions. Since it could refuse permission

altogether, it could allow the corporation to do business within the state subject to certain conditions. One of these conditions could be the consent of the corporation to be sued in the state. The corporation, then, could be required to appoint an agent to receive service of process in suits brought against it within the state. If the foreign corporation has actually made such appointment, it is clear that it has consented to be sued and the state's courts have jurisdiction to render a valid judgment against it. Whether the jurisdiction extends to suits upon all causes of action or only to those growing out of business done within the state is a question to be determined by ascertaining how broadly the consent given is to be interpreted.

"The consent doctrine has been enunciated in many judicial decisions, and is a satisfactory enough explanation of the basis of jurisdiction where consent is in fact given. There are situations, however, where actual consent is difficult if not impossible to find, and yet where it has been held that courts have jurisdiction to render judgment against the foreign corporation. • • • So the consent theory is not broad enough to cover all the situations where it is clear, as a matter of established law, that the corporation may be sued.

"Faced with this difficulty, some authorities have said that adherence to facts demands that it be realized that a corporation is in truth present wherever it does business. Wherever the group activity of the corporate enterprise is being carried on, there the corporation is found. • • •

"It may be said, then, that a foreign corporation (I) may be sued in a state where it consents to be sued; (II) even in the absence of consent, if the foreign corporation does business in a state it becomes subject to the jurisdiction of the courts of the state to the extent that the state's laws so provide, and subject to the limitations of due process of law. The jurisdiction in the latter case extends only to causes of action arising out of business done in the state.

"Unless the foreign corporation is doing business in the state it is not, in the absence of express consent,

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> subject to the jurisdiction of its courts. The mere presence within the state of an agent or even a principal officer is insufficient as a basis for jurisdiction, and a judgment rendered against the corporation upon such service is invalid. But if the corporation has been engaged in business in the state and has later ceased to do so, the state may provide for service of process upon the corporation for causes of action which arose within the state before the withdrawal."

The treatment of this subject in Henderson: *The Position of Foreign Corporations in American Constitutional Law*, Chap. 5, *supra*, is of like import.

It seems to us clear that these jurisdictional doctrines relate uniquely to actions *in personam* with reference to which they grew up. They do not relate to jurisdiction in proceedings *in rem* or *quasi in rem*. Thus, in *Beale on Foreign Corporations* (1904) § 283, we read:

> "Though a State has no power over a foreign corporation, it nevertheless has complete jurisdiction over the property of the corporation within its borders. Irrespective, therefore, of whether the corporation has done business within the State or has consented to be sued in its courts, the courts of the State may proceed *in rem* against any tangible property situated in the State. • • •
>
> "On this ground are to be justified suits against a foreign corporation which has not done business within the State, begun by attachment of property of the corporation within the State, the corporation being served by publication. Statutes commonly permit such suits. The jurisdiction is *quasi in rem*, and the judgment is valid so far as it affects the disposition of the property under attachment and no further."

Returning again to the *Furtick* case, the court was considering statutes which required a foreign insurance company to designate an agent for the service of process, and authorized service upon the agent. The first such statute was adopted in 1879 (16 *Laws of Del.*, Chap. 347, p. 359), subsequent to the foreign corporation attachment Act of

1857. The *Furtick* case was decided in 1897. We think the opinion shows that the court's construction of the statutes before it was materially affected by the non-migratory and consent doctrines of jurisdiction *in personam* over foreign corporations. It treated the requirement of designation of an agent as a condition of permission to do business in Delaware and held that "only such jurisdiction is claimed as is necessary to deal with litigation arising out of the business that is done under this permission." The court further said that the statute must "be construed with reference to the old law, the mischief and the remedy." But the court did not discuss *quasi in rem* proceedings in this connection. It nowhere referred to them as a part of the "old law," or as affected by the "remedy" of the new. We find no justification for implying, as qualifications of the 1857 *quasi in rem* Act, the exclusion of "foreign causes" and non-resident plaintiffs, which the court implied as qualifications of the subsequent act relating to proceedings *in personam*.

In the Alabama and Louisiana cases, *supra*, the courts reached different results based on different reasoning. That reasoning does not seem to us as satisfactory as the foregoing, and we decline to follow the cases.

We have not overlooked the language of this Court in the *Moffat Tunnel* case, *supra*. That language must be read with reference to the facts and questions before the Court. The holding was that Section 4631 does not authorize *quasi in rem* proceedings against foreign municipal or public corporations. The Court did say that foreign attachment process cannot be utilized "where if the process were that of a summons personally served, the court would refuse to assert its jurisdiction over the defendant." But the Court did not have before it a question of limiting *quasi in rem* jurisdiction under an older statute by conditions which developed solely with relation to jurisdiction *in personam* under later statutes. The *Moffat Tunnel* case, in our view, decides nothing contrary to what we now hold: that Section 4631 authorizes proceedings by foreign plaintiffs based on "foreign" causes of action.

Petitioner's second point is that if Section 4631 be construed as applicable to the three law actions, it would unreasonably burden interstate commerce and to that extent be

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void by virtue of violating the commerce clause of the Federal Constitution. The following facts, in addition to others stated above, were considered by the Superior Court particularly with reference to this point, and will be adopted here for present purposes:

1. The petitioner carries on a large interstate business in the middlewest consisting of the refining of crude oil into petroleum products in Illinois, Indiana, Missouri, Kansas and Wyoming, and the marketing of such products not only in the five mentioned states but in ten other states. In addition to this general interstate business the petitioner is specifically engaged on a large scale in the interstate transportation of its products. To this end petitioner maintains hundreds of miles of interstate pipe lines, interstate barge lines, interstate tanker lines and interstate trucking lines. These lines move millions of barrels of petroleum products in interstate commerce.

2. In connection with petitioner's business there are presented against petitioner annually in excess of 2500 claims or causes of action for personal injuries and property damage. In many of such cases petitioner deems it imperative or advisable to leave the determination of its liability with respect to such claims to the courts. More than 75% of such claims involve facts known to employees of petitioner directly engaged in petitioner's interstate transportation operations. The trial of claims requires the presence of such employees as witnesses. If the State of Delaware should assume jurisdiction over claims against petitioner by virtue of Delaware's attachment statutes, litigation of such claims would entail long absence of petitioner's officers and employees from their customary occupations in connection with testifying in such Delaware litigation and would impair substantially the efficiency of petitioner's interstate operations as well as cause, directly and indirectly, heavy expense to the petitioner.

3. The present litigation would be particularly burdensome to petitioner as well as to the courts and taxpayers of the State of Delaware for it involves issues of tremendous magnitude and may require the taking of thousands of

pages of testimony and the calling of a very large number of witnesses, none of whom resides in Delaware.

The portion of the commerce clause upon which petitioner relies is as follows (Art. I, Sec. 8, Federal Constitution):

> "The Congress shall have Power • • • To regulate Commerce • • • among the several States • • •."

Petitioner says that "By virtue of this delegation of authority to the Federal government it has been held under a variety of circumstances that the several states may not, by direct regulation, taxation, or otherwise, unduly obstruct or burden commerce among the several states," citing *International Textbook Co. v. Pigg*, 217 U. S. 91; *Buck Stove Co. v. Vickers*, 226 *U. S.* 205; *Adams Mfg. Co. v. Storen*, 304 *U. S.* 307; *Best & Co. v. Maxwell*, 311 *U. S.* 454; *Western Union Tel. Co. v. Kansas*, 216 *U. S.* 1. This proposition is not disputed. Next, petitioner argues that "state jurisdictional statutes (like Section 4631 here) whereby states attempted to exercise jurisdiction over foreign corporations actively engaged in interstate commerce upon foreign causes of action" have been held violative of the commerce clause "wherever it could factually be shown, as in the present case, that the exercise of jurisdiction, in fact, would substantially impair the efficiency of the petitioner's operations in interstate commerce," citing *Davis v. Farmers Co-operative Co.*, 262 *U. S.* 312; *Atchison Ry. Co. v. Wells*, 265 *U. S.* 101; *Michigan Central v. Mix*, 278 *U. S.* 492; *Denver & R. G. W. R. Co. v. Terte*, 284 *U. S.* 284.

In each of these cases, the foreign corporation which asked for and obtained immunity from suit on a foreign cause of action was a common carrier for hire. The *Davis* case was the first. An action was brought in a Minnesota court by a Kansas corporation to recover against a railway company, incorporated in Kansas, for a cause of action which arose in Kansas. The railway company was engaged in interstate commerce. It neither owned nor operated a railroad in Minnesota but maintained an agent there for the solicitation of traffic. The Supreme Court of Minnesota held that the railway company was subject to the jurisdiction of the Court of that state under a Minnesota statute

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authorizing service upon a foreign carrier's traffic soliciting agent in the state. The judgment for plaintiff was reversed by the Supreme Court of the United States, which found that the attempted subjection to suit by foreign plaintiffs on foreign causes of action imposed upon interstate commerce a serious and unreasonable burden, which rendered the statute obnoxious to the commerce clause. The court said:

"Solicitation of traffic by railroads, in states remote from their lines, is a recognized part of the business of interstate transportation. • • •

"That the claims against interstate carriers for personal injuries and for loss and damage of freight are numerous; that the amounts demanded are large; that in many cases carriers deem it imperative, or advisable, to leave the determination of their liability to the courts; that litigation in states and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations; and that this impairs efficiency in operation, and causes, directly and indirectly, heavy expense to the carriers—these are matters of common knowledge. Facts, of which we, also, take judicial notice, indicate that the burden upon interstate carriers imposed specifically by the statute here assailed is a heavy one; and that the resulting obstruction to commerce must be serious. • • •

"The fact that the business carried on by a corporation is entirely interstate in character does not render the corporation immune from the ordinary process of the courts of a state. International Harvester Co. v. Kentucky, 234 U. S. 579, 34 Sup. Ct. 944, 58 L. Ed. 1479. The requirements of orderly, effective administration of justice are paramount. • • • But orderly effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in a state in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside. The public and the carriers are alike interested in maintaining

adequate, uninterrupted transportation service at reasonable cost. This common interest is emphasized by Transportation Act 1920, which authorizes rate increases necessary to ensure to carriers efficiently operated a fair return on property devoted to the public use. See Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U. S. 563, 42 Sup. Ct. 232, 66 L. Ed. 371, 22 A. L. R. 1086; The New England Divisions Case, 261 U. S. 184, 43 Sup. Ct. 270, 67 L. Ed. —. Avoidance of waste, in interstate transportation, as well as maintenance of service, have become a direct concern of the public. With these ends the Minnesota statute, as here applied, unduly interferes. By requiring from interstate carriers general submission to suit, it unreasonably obstructs, and unduly burdens, interstate commerce."

In *Denver & R. G. W. R. Co. v. Terte, supra,* the Supreme Court applied the rule of the *Davis* case in a suit in a state Court begun by attachment against a foreign carrier for hire, not doing business in that state, where the suit was based on a foreign cause of action.

Petitioner has cited no cases according the immunity from suit to a corporation other than a carrier for hire, but it urges that the immunity is not limited to carriers for hire and that the reasons for the rule are as applicable to it as to such a carrier. In support of this, petitioner refers to *Hansell: The Proper Forum for Suits Against Foreign Corporations,* 27 *Col. Law Rev.* 12; *McGowan: Litigation as a Burden on Interstate Commerce,* 33 *Ill. Law Rev.* 875, 1 *Beale on Conflict of Laws,* pp. 377, 378.

We think the immunity principle evolved in the *Davis* case and followed in subsequent cases does not apply to a private business corporation such as petitioner, even though it engages extensively in interstate commerce and transports its own materials and products across state lines, and even though subjection to suit would substantially impair the efficiency of its operations in interstate commerce. We agree that the immunity principle is based upon a finding of an unreasonable burden on interstate commerce. But, the cases do not, in our view, sanction the finding of such a

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burden as to invoke the principle wherever it may appear that the efficiency of *any* business activities in interstate commerce would be substantially impaired by subjection of a foreign corporation to suit on a foreign cause. As we understand the reasoning of the Supreme Court, the conclusion that subjection to suit would impose an undue burden was grounded not only upon anticipated impairment of efficiency of interstate activities; but as well upon the particular kind of interstate activities under consideration (those of a carrier for hire) and the public interest and concern with the maintenance of those activities. (See quotation above from the *Davis* case.) Petitioner is not a carrier for hire; and we are not persuaded that this Court should equate petitioner's activities and the interest of the public in their maintenance, with the activities of a carrier and the public interest in maintaining them; or otherwise make general a rule which, because of its application thus far and the reasons given by the Supreme Court for applying it, seems to us particular. We, therefore, hold that the exercise of jurisdiction over petitioner in the three law actions would not constitute an unreasonable burden on interstate commerce so as to violate the commerce clause.

Petitioner's last point is that if Section 4631 be construed to authorize the attachments here, it would deprive petitioner of property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution. Petitioner says that because of the requirements of the due process clause, "a foreign corporation may * * * be held to answer only upon domestic causes of action", in the absence of express consent to be sued, citing *Simon v. Southern Railway*, 236 *U. S.* 115, *Old Wayne Life Ass'n v. McDonough*, 204 *U. S.* 8; *Internat. Shoe Co. v. Washington*, 326 *U. S.* 310; 1 *Beale on Conflict of Laws* (1935) p. 380. The cases were proceedings *in personam*, not *quasi in rem*, as here. Petitioner describes this distinction as a difference in the form of process, summons or attachment, by which the actions were commenced. It then argues that in *Denver & R. G. W. R. Co. v. Terte*, 284 *U. S.* 284 (*supra*), the Supreme Court "held that the constitutional limitation upon state court jurisdiction originating in the commerce clause

should apply whether the action was commenced by summons or attachment", quoting the following from the opinion:

> "The prohibition against burdening interstate commerce cannot * * * be evaded merely by attaching the property of the nonresident railroad corporation. Obviously, the burden and expense which the carrier must incur in order to make defense in a state where the accident did not occur has no relation to the nature of the process used to bring it before the court."

This principle, petitioner urges, "must apply with equal force where the constitutional limitation is found in the Fourteenth Amendment rather than in the commerce clause. The rule that a foreign corporation may not be required by virtue of the Fourteenth Amendment to defend a suit upon a foreign cause of action in a jurisdiction in which it does no business and has not consented to be sued, applies whatever the process by which it is sought to compel such a defense."

Petitioner's analogy seems to us inapt, and its conclusion unsound. The limitation upon suits against foreign corporations, derived from the commerce clause, is based upon a finding of a burden on interstate commerce, and does not relate to any jurisdictional doctrine specially applicable either to proceedings *in personam* or proceedings *quasi in rem*. On the other hand, the limitation upon suits against foreign corporations, derived from the Fourteenth Amendment is based on "consent" and "corporate presence" doctrines which, as is apparent from the discussion under the first point in this opinion, relate uniquely to jurisdiction in proceedings *in personam* against foreign corporations. Since these jurisdictional doctrines have no connection with proceedings *quasi in rem*, the constitutional limitation asserted by petitioner has no application here.

Our conclusion is that the motions to dismiss the petitions for writs of prohibition should be granted.

An order accordingly will be entered in each case.

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MAR 26 1949
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 529-530-531

STANDARD OIL COMPANY,
A Corporation of the State of Indiana,
Appellant,

vs.

THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, and the HONORABLE FRANK L. SPEAKMAN, Sitting as Judge of Said Court, and JACOB BLAUSTEIN

Appellees

APPEALS FROM THE SUPREME COURT OF THE STATE OF DELAWARE

PETITION FOR REHEARING

HUGH M. MORRIS
RALPH S. HARRIS
THOMAS E. SUNDERLAND
JOHN R. MCCULLOUGH
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Supreme Court of the United States

OCTOBER TERM, 1948

STANDARD OIL COMPANY, A Corporation of the State of Indiana, *Appellant,* *vs.* THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, and the HONORABLE FRANK L. SPEAKMAN, Sitting as Judge of Said Court, and JACOB BLAUSTEIN *Appellees*	Nos. 529-530-531

APPEALS FROM THE SUPREME COURT OF THE STATE OF DELAWARE

PETITION FOR REHEARING

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Petitioner, Standard Oil Company, a corporation of the State of Indiana, prays this Court for a rehearing, pursuant to Rule 33, of this Court's action in dismissing on March 14, 1949, "for want of a substantial federal question", petitioner's appeals from final judgments of the Supreme Court of Delaware.

The effect of the determinations below is to permit entry of judgments against petitioner in actions commenced solely

by writs of foreign attachment, although the plaintiffs are non-residents, the defendant is a foreign corporation doing no business within the State of Delaware and not qualified to do business there, and although the causes of action arose outside of that state. The conclusion of the lower court was reached *in spite of the fact* that it found that subjection of petitioner to suit in Delaware would "impair substantially the efficiency of petitioner's interstate operations" and "would be particularly burdensome to petitioner".

The appeals raise for decision by this Court the constitutionality of Section 4631 of the Delaware Code (1935) as applied and enforced against petitioner by the Delaware courts. Petitioner urged, both upon the Superior Court and upon the Supreme Court of Delaware, that the challenged statute as applied and enforced violated the commerce clause of the Constitution and denied petitioner due process under the Fourteenth Amendment. The Delaware courts expressly passed upon both constitutional questions and, in full opinions, expressly sustained the validity of the challenged statute against petitioner's claim of its repugnancy to the Constitution.

Important constitutional questions not heretofore decided by this Court are presented by these appeals. Briefly stated, the questions are:

Commerce Clause Question

Is not the challenged Delaware statute, as construed and applied by the courts below, repugnant to the commerce clause of the Constitution, in view of the fact, found by the courts below and not in dispute, that the exercise of jurisdiction in these cases pursuant thereto would "impair

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substantially the efficiency of petitioner's interstate operations"?

The Supreme Court of Delaware sustained the validity of the statute in question, against petitioner's attack that it imposed an unconstitutional burden on interstate commerce, solely because that court believed that "the immunity principle evolved in the *Davis* case* and followed in subsequent cases does not apply to a private business corporation such as petitioner, *even though it engages extensively in interstate commerce and transports its own materials and products across state lines, and even though subjection to suit would substantially impair the efficiency of its operations in interstate commerce*" (Exh. B to "Statement as to Jurisdiction", p. 64).**

Due Process Question

Is not the statute repugnant to the due process clause of the Fourteenth Amendment of the Constitution when construed and applied to validate attachments obtained by non-residents against a foreign corporation (not doing business and not qualified to do business in the state of the forum) in a case involving a foreign cause of action?

The Supreme Court of Delaware sustained the validity of the statute, against petitioner's attack that it denied due process of law under the Constitution, solely on the ground that actions commenced by writs of foreign attachment were *"quasi in rem"* and that, therefore, cases in this Court, such as *Simon* v. *Southern Railway*, 236 U. S. 115, relating to actions commenced by the issuance of personal process, *i.e.*, writs of summons, were inapplicable. This

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*_Davis_ v. _Farmers Co-operative Co._, 262 U. S. 312.

**Italics supplied unless otherwise indicated.

determination was arrived at in spite of the finding by the lower courts that *"The present litigation would be particularly burdensome to petitioner * * * for it involves issues of tremendous magnitude and may require the taking of thousands of pages of testimony and the calling of a very large number of witnesses, none of whom resides in Delaware."* (Exh. B to "Statement as to Jurisdiction", p. 61-2.)

The principles with which these appeals are concerned are, it is respectfully submitted, of too great public importance to be settled by the dismissal of the appeals without a hearing, a form of decision which would leave grave doubts of the full import of the Court's action, especially since the questions presented have not heretofore been decided by this Court. If the law eventually should be settled otherwise than in the cases appealed from, petitioner may have in the meantime been irreparably damaged because it was denied an opportunity to present its case to this Court.

Petitioner respectfully submits that it is entitled to a rehearing for the following reasons:

Equitable Life Assurance Society v. *Brown,* 187 U. S. 308, 311, states the long established rule with respect to dismissals of appeals by this Court "for want of a substantial federal question." It is there specifically laid down that, assuming that the case falls within the language of Section 1257(2) of Title 28 and that other formalities are complied with, a "substantial federal question" is presented unless the question is

(a) "so absolutely devoid of merit as to be frivolous", or

(b) "has been so explicitly foreclosed by a decision or decisions of this Court as to leave no room for real controversy."

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From that case and the other decisions hereinafter referred to, it would appear that appeals under Section 1257(2) were, subject to the qualifications above stated, matters of right rather than of discretion. Otherwise such appeals would stand in the same position as petitions for writs of *certiorari* and other writs. Surely neither Congress, by its enactments, nor this Court, by its rules, intended such a result, else appeals under Section 1257(2) would have been classified with petitions for writs.

Since it requires no argument to demonstrate (a) that the appeals are not frivolous, (b) that they fall within the language of Section 1257(2) and, (c) that other formalities have been complied with, it would appear from the dismissal of the appeals that this Court was under the impression that the constitutional questions presented had been "explicitly foreclosed" by other decisions of this Court. That would mean that this Court had held: (a) that the rule of *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312, and of the three decisions expressly following that case,* in which the commerce clause was held to protect foreign corporations against the undue burden resulting from the exercise of state court jurisdiction with respect to foreign causes of action, might be invoked only by carriers for hire and that, accordingly, a private carrier, no matter how extensive its actual interstate transportation business might be and no matter how great a burden upon its activities in interstate commerce would result from the exercise of that same jurisdicition, might not invoke the protection of the commerce clause available to carriers for

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**Atchison Ry. Co.* v. *Wells*, 265 U. S. 101; *Michigan Central* v. *Mix*, 278 U. S. 492; *Denver & R. G. W. R. Co.* v. *Terte*, 284 U. S. 284.

hire; and (b) that the protection of the Fourteenth Amendment against the exercise of state court jurisdiction, where such jurisdiction was invoked by a non-resident with respect to a foreign cause of action against a foreign corporation doing no business within the state of the forum, was available to a defendant only when the action was commenced by writ of summons and not when the action was commenced by writ of foreign attachment, although the undue burden imposed upon the foreign corporation was equally great in either case.

The dismissals of these appeals "for want of a substantial federal question" are themselves likely to be regarded as holdings to the foregoing effect.

In fact this Court has not heretofore passed on the questions posed by the appeals. Petitioner is, therefore, led to believe that it failed to emphasize with sufficient clarity in its "Statement as to Jurisdiction" the considerations upon which it believes it is entitled to a review by this Court of the judgments below.

Petitioner therefore respectfully begs leave to call this Court's attention to the following:*

1. The plaintiffs are all non-residents of Delaware, none of whom was doing any business in that state;

2. Petitioner is an Indiana corporation not qualified to do business in Delaware and in fact doing no business of any nature within that state, but on the other hand, *inter alia*, engaged on a large scale in interstate transportation in some fourteen middlewestern states;

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*The statement of facts and arguments in this petition have necessarily been much abbreviated. A consideration of this petition in conjunction with the "Statement as to Jurisdiction" is respectfully suggested.

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3. The causes of action all arose outside of the State of Delaware;

4. The actions were commenced by the issuance of writs of foreign attachment pursuant to Section 4631 of the Delaware Code (1935);

5. The writs of foreign attachment sought merely to attach petitioner's interest in shares of a Delaware corporation; the writs of attachment were served upon the statutory agent of the Delaware corporation; none of the certificates of stock was physically within the State of Delaware;

6. None of the actions was directed toward a determination of title to the stock sought to be attached, nor were any of the alleged causes of action set forth in the declarations of the plaintiffs below connected in any wise with the stock sought to be attached; the actions sought total damages of approximately $50,000,000 for alleged breach of a written contract;

7. No summons or process other than the writs of attachment themselves issued out of the Delaware court;

8. No notice of the institution of the actions was given to petitioner by plaintiffs below or by the officer serving the process;

9. The defense of these actions (as specifically found by the Supreme Court of Delaware) would "impair substantially the efficiency of petitioner's interstate operations as well as cause, directly and indirectly, heavy expenses to petitioner" and "would be particularly burdensome to petitioner * * *" (Exh. B to "Statement as to Jurisdiction", p. 61).*

*The Superior Court made similar findings in identical language, except that the petitioner was there referred to as "defendant" (Exh. A to "Statement as to Jurisdiction", p. 26).

The extended consideration given to the constitutional questions both by the Superior Court and by the Supreme Court of Delaware, the action of the Supreme Court in granting a stay of further proceedings pending appeal here (R. 314-5) and the allowance of this appeal by the Chancellor of Delaware (R. 403-4), all suggest that the Chancellor and the courts below believed that substantial federal questions were here involved.

In no reported decision has this Court limited the doctrine of the *Davis* case and those following it to common carriers for hire, so as to foreclose adversely petitioner's contention with respect to the commerce clause. We respectfully submit that, in the light of the finding of the courts below that the exercise of jurisdiction over this foreign corporation would impair the efficiency of its interstate operations, no different rule should be applied to it than would have been applied had it been a carrier for hire. *At least petitioner prays that it be given an opportunity to present that thesis.*

In no reported decision has this Court limited the doctrine of *Simon* v. *Southern Railway*, 236 U. S. 115, and cognate cases, so as to foreclose adversely petitioner's contention here with respect to due process. Admittedly, where the defendant, as here, is in no wise connected with the State of Delaware, personal service of writ of summons could not have been made upon it. We submit that the rule should not be different merely because the process of writ of foreign attachment rather than of writ of summons is availed of to commence an action looking toward an *in personam* judgment. *At least petitioner prays that it be given an opportunity to present that thesis.*

It is respectfully submitted that, if the doctrine of *Davis* v. *Farmers Co-operative Co., supra,* is to be limited as it

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was below, that limitation should flow not by way of inference from the dismissal of the appeals but only from an express opinion of this Court. This is particularly true in the light of the uniform view of textbook and law review authors that there should be no such limitation. Hansell, 'The Proper Forum for Suits against Foreign Corporations", 27 Col. L. Rev. 12, 14-5; McGowan, "Litigation as a Burden on Interstate Commerce", 33 Ill. L. Rev. 875, 882; 1 Beale, "Conflict of Laws", 377-8. Similarly, if the doctrine of *Simon* v. *Southern Railway, supra,* is to be so limited, that limitation likewise should flow only from an express opinion of this Court.

Petitioner's unsuccesful attack below upon the constitutionality of the Delaware statute, as construed by the courts below, presents a case of which this Court clearly has appellate jurisdiction and the dismissal of the appeals is at variance with *Charleston Assn.* v. *Alderson,* 324 U. S. 182, where the rule was stated to be as follows (p. 185):

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal."

The foregoing statement was a reiteration of a principle well established and long adhered to. Thus, in upholding its jurisdiction, this Court in *Fiske* v. *Kansas,* 274 U. S. 380, said (p. 385):

> "A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that, if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and

> the judgment is, therefore, reviewable by writ of error under § 237 of the Judicial Code."

In *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, the rule was stated thus (p. 290):

> "Our conclusion on the jurisdictional question is that, as the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced was repugnant to the Constitution and void, the case is rightly here on writ of error."

It is in the public interest, as well as of grave importance to petitioner, that this Court determine (a) whether or not the protection of the commerce clause of the Constitution against the exercise of proscribed state court jurisdiction is available only to common carriers for hire, and (b) whether or not the protection of the due process clause of the Fourteenth Amendment is available only in actions commenced by writ of summons.

For all of the foregoing reasons petitioner respectfully prays that this Court grant this petition for rehearing and note probable jurisdiction of the appeals.

Respectfully submitted,

STANDARD OIL COMPANY,
Petitioner,

By: HUGH M. MORRIS,
RALPH S. HARRIS,
THOMAS E. SUNDERLAND,
JOHN R. MCCULLOUGH,
FREDERICK W. P. LORENZEN,
Counsel for Petitioner.

Dated: March 25, 1949.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay.

RALPH S. HARRIS

Nos. 529, 530 and 531. STANDARD OIL CO. OF INDIANA *v.* SUPERIOR COURT OF DELAWARE IN AND FOR NEW CASTLE COUNTY ET AL. Appeals from the Supreme Court of Delaware. *Per Curiam:* The appeals are dismissed for want of a substantial federal question. *Hugh M. Morris, Ralph S. Harris, John R. McCullough* and *Frederick W. P. Lorenzen* for appellant. Reported below: — Del. —, 62 A. 2d 454.